

No. 18,774.

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IN THE  
**UNITED STATES COURT OF APPEALS**  
FOR THE NINTH CIRCUIT.

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PAUL SACHS ORIGINALS CO.,  
Appellant,

vs.

JOHN SACHS and LEO HIRSCH, Doing Business as  
SACHS OF CALIFORNIA, a Partnership,  
Appellees.

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**BRIEF OF APPELLANT.**

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Appellees.

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**BRIEF OF APPELLANT.**

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**STATEMENT OF JURISDICTION.**

This action was instituted by plaintiff-appellant, hereinafter referred to as appellant, Paul Sachs Originals Co., for infringement of Certificates of Registration No. 502,925 and No. 708,120, issued by the United States Patent Office on October 12, 1948 and December 6, 1960, respectively, and for unfair competition, by reason of the use of the term "SACHS of California" by defendants-appellees, hereinafter referred to as appellees, both as a trademark to distinguish women's dresses produced and sold by appellees and to distinguish their business devoted to the manufacture and sale of dresses, in view of the prior use

by appellant of the trademarks PAUL SACHS Original and DON SACHS in conjunction with women's dresses, as well as in view of the prior use by appellant of the term Paul Sachs Originals Co. as a trade name for its business. The Complaint appears at page 2 of the Record.\* The jurisdiction of the District Court was invoked under Title 15 of the United States Code, Section 1121; under Title 28 of the United States Code, Section 1338 (a) and 1338 (b); and by further reason of the fact that this action is of a civil nature between citizens of different States, appellant being a Missouri corporation and appellees being residents of the State of California, in which the amount in controversy exceeds the amount of Ten Thousand Dollars (\$10,000), exclusive of interest and costs. The Answer of appellees John Sachs and Leo Hirsch is set forth at page 24 of the Record. The Answer placed in issue the questions of trademark infringement and unfair competition, as it contained a denial that the concurrent use of the trademarks and trade names of the parties in conjunction with their respective dresses and dress businesses would be likely to cause confusion or mistake or deception of purchasers as to the source of origin of the goods.

The action was tried on the issues framed by the Complaint for trademark infringement and unfair competition (R 2) and the Answer (R 24). The District Court did not make findings of fact and conclusions of law, but in substitution therefor prepared and filed a Memorandum of Decision (R 30). The judgment dismissing the complaint was entered on April 5, 1963 (R 52). A Notice of Appeal was timely filed on May 3, 1963 (R 54).

This Court has jurisdiction of this appeal pursuant to Title 28 of the United States Code, Section 1291, and Title 15 of the United States Code, Section 1121.

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\* References to the Record will hereinafter be indicated "R", and references to the transcript of testimony will be referred to by "RTR".

## STATEMENT OF THE CASE.

The District Court in its Memorandum of Decision (R 30) held:

“\* \* \* that the merchandise of the parties is not identical and that the trademarks are clearly distinguishable by their customers and that there is no likelihood of confusion from the use of the tradename and trademark ‘Sachs of California’ by the defendants.”

The issue is raised by the appeal from the Judgment providing the dismissal of the complaint. Appellants prosecute this appeal to seek a reversal of the Judgment of the District Court as it considers the judgment to be most damaging to the primary assets of its business, its trademarks, with the prospect of continuous dilution of its said trademarks being implicit by virtue of such Judgment.

The cardinal issue in this cause is whether or not the concurrent use of the trademarks of the parties upon the respective merchandise, namely women’s ready-to-wear dresses, is likely to cause confusion or mistake or deception among retail customers as to the source of origin of the goods. The same issue relates to the tradenames used by the parties for identifying their dress manufacturing businesses.

The basic facts of the case are as follows: appellant commenced using its trademark PAUL SACHS Originals in May, 1942 to identify ladies’ and misses’ dresses, Exhibit 1, which it produces and sells, and has continuously used said trademark upon its dresses to the present time (RTR 205). Since August, 1959, appellant has also used the trademark DON SACHS to identify another line of

women's dresses it produces and sells known as "petites" (RTR 145), and has also continuously used that trademark to the present time (RTR 206). All dresses sold by appellant from May, 1942 have been identified by either one or the other of appellant's trademarks (RTR 206, 209) and such dresses have been sold upon a national scale since such first use (RTR 220, 221). Appellant's sales for its dresses identified by the said trademarks from 1942 to the date of trial, May, 1962, have exceeded annually \$1,500,000 (RTR 224) and during this period appellant has expended a total of \$400,000 to advertise its dresses under said trademarks (RTR 222). Appellant at the time of trial was selling its dresses under the said trademarks to an estimated 1,200 accounts (RTR 232) and during the 10 years prior to trial had sold its dresses to over 2,500 different accounts (RTR 232). Appellant sends its advertising pieces, such as Exhibit 67 (RTR 230) and like publicity material concerning its dresses under the said trademarks to a mailing list of over 13,500 prospective accounts (RTR 230).

Appellant maintains a sales force of 8 men for covering the United States (RTR 225) and has showrooms in St. Louis, Missouri; New York, New York; and Dallas, Texas (RTR 215). Appellant's dresses are sold to department stores and specialty shops (RTR 97, 211) (and see Vogue Magazine Exhibits).

Appellant's trademark PAUL SACHS Originals is the subject matter of United States Registration No. 502,925, Exhibit 1, which has become incontestable by reason of the filing on October 22, 1953 of affidavits under Sections 8 and 15 of the Trademark Act of 1946 (15 U. S. C. 1058a, 15 U. S. C. 1065). Said registration sets forth a disclaimer to any exclusive right to the use of the word "Original". The trademark DON SACHS forms the subject matter of United States Certificate of Registration No.

708,120, Exhibit 2, which was published in the Official Gazette of the United States Patent Office on September 20, 1960, Exhibit 70. The merchandise covered in each registration is ladies' and misses' dresses.

Appellant has advertised its dresses under its trademarks in national consumer publications from November 15, 1942, Exhibit 7, and continued such advertising through the early 1940's and early 1950's as in Vogue, Mademoiselle and Charm, Exhibits 10 through 34, inclusive, 36, 38, 40 through 44, 47 and 49 (RTR 215).

National advertising was suspended temporarily in the mid 1950's in view of certain internal circumstances of appellant but was resumed in the February 15, 1960 issue of Vogue magazine, Exhibit 25. Appellant's dresses have been advertised under its trademarks by various of its customers from mats supplied by appellant (RTR 235), Exhibits 59 through 63, inclusive (RTR 236) being exemplary of advertisements prepared therefrom by California accounts of appellant before inception of appellees' business.

With respect to its operations in California during the 10 year period prior to the commencement of appellees' business in the Fall of 1960, appellant, through its representative, Mr. Eddie Silk, sold its dresses in an average annual volume of \$100,000 at wholesale (RTR 114); during such period appellant's dresses under its trademarks had been sold to an estimated 300 California accounts (RTR 114), at least 100 of which were annually active. Appellant's dresses under its trademarks had been sold during said period in over 75 different California cities, with the annual number being between 60 and 70 (RTR 115). During this 10 year period Mr. Silk had exhibited appellant's dresses at the Pacific Coast Travelers Association Market Week in the Biltmore Hotel in Los

Angeles, California, 5 times annually (RTR 90, 91). Mr. Silk also displayed appellant's dresses regularly at similar markets in San Francisco, Seattle, Portland and Phoenix, during the same period (RTR 90).

On September 26, 1960, appellees, John Sachs and Leo Hirsch recorded Articles of Partnership of their firm known as SACHS of California (R. 25). John Sachs, who for three years prior had been a partner in the firm known as Steffi of California (RTR 505), is the active manager of appellees' firm (RTR 498), while Mr. Hirsch takes no part in the day-to-day operations (RTR 63). Appellees' firm produces and sells women's ready-to-wear dresses which are identified by a cloth label, Exhibit A, bearing the trademark "SACHS of California", which dresses are characterized by appellees as "young misses or missy" (RTR 382). Appellees' dresses under their said trademark are sold to department stores and specialty shops (RTR 510). Appellees, since forming their partnership, cause their dresses under their said trademark to be displayed at the Pacific Coast Travelers Association Market Week at the Biltmore Hotel in Los Angeles, California (RTR 516). Appellees are members of an organization known as California Fashion Creators (RTR 513) and display at market weeks sponsored by that organization (RTR 514). Appellees gave no evidence as to volume of sales either in dollars or units, but 75% of their business is conducted in the State of California (RTR 541), wherein they have sold their dresses to around 175 to 200 accounts (RTR 540). The other 25% of appellees' business in its dresses under its said trademark is outside the State of California, with two-thirds of such out-of-state business being east of the Rockies (RTR 542). During the year preceding trial sales were made in 41 states (RTR 538). Appellees have not advertised their dresses in national consumer publications and gave no evidence of any expenditures for advertising.

Before adopting its trademark, appellees did not search the records of the United States Patent Office (RTR 64). Appellant notified appellees in June, 1961, of its objection to appellees' use of the term "Sachs of California"; said notice being less than nine months after appellees' commencement. Appellees did not refrain from usage of said mark and this litigation ensued.

### **SPECIFICATION OF ERRORS.**

1. The court erred in not holding that appellees' use of the trade name and trademark SACHS of California did infringe appellant's trademarks;
2. The court erred in not holding that appellees' use of the term SACHS of California constituted unfair competition;
3. The court erred in denying appellant the relief prayed for in the complaint;
4. The court erred in dismissing the complaint.



## OUTLINE OF ARGUMENT.

### I. INTRODUCTORY.

### II. MERCHANDISE OF THE PARTIES SO RELATED AS TO BE CAPABLE OF EMANATING FROM SAME SOURCE.

#### A. Physical Similarities.

1. Styling.
2. Color.
3. Size.

#### B. Similarity of Trade Channels.

1. At Wholesale.
2. To the Same Stores.
3. For Sale to Same Retail Customers.
4. Sold in Overlapping Price Range.
5. Trade Recognizes No Distinction.
6. Co-Extensive Geographical Distribution.
  - a. California.
  - b. Nation-Wide.

#### C. Direct Competition Not Requisite for Relief.

#### D. Expansion Test for Relationship of Goods.

#### E. Patent Office Classification.

### III. THE TRADEMARKS OF THE PARTIES.

#### A. Consideration of Dominant Portions of Trademarks.

#### B. Appellant's Trademarks.

1. The Word "Original."
2. Sachs the Dominant Portion.

C. Appellees' Trademark.

1. "Sachs" Dominant Portion of Appellees' Trademark.
2. The Words "Of California" Without Trademark Significance.

IV. NOTICE OF APPELLANT'S TRADEMARKS.

V. NOT REQUISITE TO SHOW ACTUAL CONFUSION.

VI. THE EFFECT OF APPELLANT'S REGISTRATIONS.

VII. LIKELIHOOD OF CONFUSION ESTABLISHED.

## ARGUMENT.

### I. INTRODUCTORY.

From the facts of this case, it is evident that **appellant has priority of usage** of their trademarks and tradename so that there is no question concerning same. In addition to the matter of priority, there are two primary aspects in cases of this type, one being the goods of the parties and the other being the trademarks of the parties. Although both of the parties produce and sell women's ready-to-wear dresses for resale to retail customers in department stores and specialty shops, the District Court held the merchandise to be different on the ground that the dresses were not identical. Since it is firmly believed that the District Court's finding is contrary to law and to the evidence, one major section of the argument is directed to the relationship of the goods of the parties as viewed in light of the market place, pertinent precedents, and statutory law. A second major section of the Argument is devoted to the similarity of the trademarks, and inferentially, the tradenames of the parties, which, it is most strongly urged, are confusingly similar. In its Memorandum of Decision (R 30) the District Court did not cite a single precedent or make reference to the Trademark Act of 1946, so that there was no indication as to how the Court considered the issues of this case in view of the decisions in prior, immediately apposite cases and of pertinent statutory provisions.

### II.

#### MERCHANDISE OF THE PARTIES SO RELATED AS TO BE CAPABLE OF EMANATING FROM SAME SOURCE.

Although the merchandise of both parties is women's ready-to-wear dresses which are sold at retail in depart-

ment stores and specialty shops, the District Court held the merchandise of the parties to be different upon the ground that the same were not identical (R 50). For reasons to be discussed hereinbelow, appellant maintains that the goods of the parties are, for all practical purposes, identical, but it is submitted that the District Court erred in not applying the proper standard for determining the relationship of the goods of the parties. In cases of this type **the criterion is whether the respective merchandise could emanate from a single source of origin.** California observes this criterion, as evidenced by the statement of this Court in **Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.** (CCA 9—1960), 283 F. 2d 551, 127 USPQ 306. In that case this Court stated:

“The immediate problem in all cases is whether the offending name or mark is used for a functional purpose. If not, then it must be determined whether the similarity is likely to result in **confusion of source.**”  
(Emphasis ours.)

In **Brooks Bros. v. Brooks Clothing of California, Ltd.** (D. C. S. C. Calif.—1945), 60 F. Supp. 442, 65 USPQ 301, affirmed by this Court, 158 F. 2d 798, 72 USPQ 66, the court stated:

“\* \* \* Protection will be afforded even in the case of non-competitive goods, business and services, where, because of prior use, ‘**confusion of source**’ may result.”  
(Emphasis ours.)

Similarly, the pertinent Statute, Title 15, United States Code, Sec. 1114 (1), provides the same standard:

“Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause

confusion or mistake or to deceive purchasers **as to the source of origin of such goods** or services \* \* \* shall be liable to a civil action by the registrant for any or all of the remedies hereafter provided \* \* \*.” (Emphasis ours.)

Accordingly, a determination that the merchandise of the parties is not identical is not determinative of whether the same could emanate from a single source of origin.

It is submitted that the findings of the District Court as set forth in its Memorandum of Decision (R 30) concerning the merchandise of the parties with respect to the various properties, characteristics, and attributes of the dresses of the parties, establishes, in truth, the immediate relationship of the same, for the distinctions noted point up most sharply the similarities. If two competitive concerns wish to make a profit, they will not be expected to intentionally produce dresses which are identically dimensioned, of identical colors, of identical styling, for sale at identical prices in identical stores and shops in identical trade areas.

The District Court did find that the size ranges of the dresses of the parties overlapped (R 46); that the price range of the dresses of the parties overlapped (R 47); that both parties produce black dresses (R 47); that both parties use the same names for colors incorporated in their dresses (R 47); that both parties catered to the youthful look (R 45); and that both parties strived to have a distinctive line (R 45). These findings alone more than support the intimate relationship of the merchandise of the parties. The District Court obviously failed to consider the ephemeral nature of the parties' merchandise, since styles, colors, patterns and the like change from season to season with the whims of stylists, so that, for instance, any color differential in one season does not preclude a color coincidence in the next season.

## A. Physical Similarities.

### 1. Styling.

The District Court held that the “young missy” dress of appellee was distinguishable from the “misses” and “petite” dresses of appellant, despite the fact that the District Court stated:

“But this is a matter of individual discretion, and if a dress fits a woman, she is a potential customer” (R 44).

“All manufacturers cater to the youthful look” (R 45).

“Style seems to be a feature which varies from season to season, but youthful styles, alone, are furnished or advertised, and all manufacturers seek to be known for youthful styles in all sizes. The woman retail buyer seeks a dress that fits and that ‘does something for her,’ an expression which connotes making her look more attractive in her eyes and generally more youthful than might ordinarily be expected” (R 45).

Recognition of these basic facts vitiates grounds for distinction between the parties’ dresses.

Appellees’ witness Miss Jefferson stated that a young missy dress was:

“\* \* \* more of a career girl’s dress, a young professional or career, business, young college girl. Where the missy [misses] dress we consider as a little more mature woman wearing it” (RTR 268).

Appellees’ witness Mrs. Hope Sachs testified that for the young missy type of dress, the age bracket would be from 19 to “even 40,” but added that “age is in the mind” (RTR 373). Mrs. Sachs stated that although her age was 37 (RTR 373), she considered herself to be a “young missy person” and hence wore young missy dresses (RTR 374). Thus, the testimony of these witnesses shows that the word

“young” as utilized in the expression “young missy” relates entirely to a subjective state of mind; the eyes of the beholder being the determinant. Although Mrs. Sachs is certainly not an old woman, one cannot consider the age 37 to be that of a “young college girl.” Consequently, the use of the word “young” in “young missy” represents nothing more than the expected effort of a garment manufacturer to appeal to the constant feminine urge to look young. Appellant is equally aware of this human tendency, as evidenced by the legend “Expressions of Youth” at the bottom of each page in its swatch book, Exhibit 92 (RTR 251). That the aim of appealing to one’s desire to be young is not of recent origin with appellant is evidenced by its early advertisement in Vogue magazine, issue of November 15, 1942, Exhibit 7 (RTR 259), which was published almost eighteen years before the inception of the appellees, and wherein, in referring to its PAUL SACHS dresses, appellant makes the following statement:

“PAUL SACHS Originals \* \* \* are styled for you who like YOUNG clothes.”

Also note appellant’s Exhibits 8, 9, 20 (RTR 259), wherein it used the notation “Junior Styles in Misses’ Sizes.” This same emphasis is apparent in its more recent advertisements, as witness its Vogue Magazine ad of May, 1960, Exhibit 12 (RTR 259), wherein the following appears:

“Slim **young** silhouette, \* \* \*.” (Emphasis ours.)

In the present proceeding, appellees did not prove any difference in the styling of the dresses of the parties, and the only distinction that does exist is in the use of the word “young” in the expression “young missy.”

The lack of distinction was evident from the testimony of appellees’ expert witness Herman Schechter. After testifying that he could probably determine from a sketch of a dress whether the dress could be categorized as a misses dress or a young missy dress, he was unable to

make such a distinction when actually presented sketches of appellant's dresses as appearing in Exhibit 68 (RTR 489-490). Mr. Schechter further testified that he could not make any distinction unless he knew the manufacturer (RTR 492). On direct examination, Appellees' witness Miss Jefferson testified that there was a difference in styling between the dresses of the parties. On cross-examination, Miss Jefferson admitted that she had never had any contact with appellant or ever purchased any of its goods, and that her first examination of appellant's styles had been only a cursory study of appellant's swatch book of 1959, Exhibit 92, immediately before she took the stand (RTR 276-277). This Exhibit showed styles of a past season and hence could not properly provide any basis for a comparison of the styles of the parties current at the time of the trial.

Illuminating was the testimony of appellant's expert Mr. Eddie Silk, who testified that the dress Mrs. Sachs was wearing in the courtroom on Wednesday, May 23, was a misses dress (RTR 158), although Mrs. Sachs admittedly wore appellees' dresses. The same dress was, in her eyes, a young missy, while in the eyes of a third party, a misses dress. Any attempt to make a distinction relative to the age of the wearer of the parties' dresses was negated by appellees' witness Miss Jefferson, who stated that a thirty-year old woman and a seventeen-year-old girl could buy the same dress (RTR 295).

Therefore, the record is devoid of any proof as to a distinction in styling. However, if, perchance, during the course of any one season there should exist some difference in styling of the dresses of the parties, such distinction would be of no moment, since the same would not preclude comprehensive style coincidence during a succeeding season, nor in any way serve to prevent the goods from being considered as emanating from the same source. Most apt is the case of **Williamson-Dickie Mfg. Co. v. Davis Mfg.**



**Co.** (CCA 3-1958), 251 F. 2d 924, 116 USPQ 303, wherein the defendant sought to distinguish its boys' clothing from that of plaintiff upon the ground that they were "tailored garments." The Court admitted that defendant's line was more expensive and of a better quality than the play suits, work suits, dungarees, etc., which constituted the larger part of the plaintiff's line, but, in holding for the plaintiff, the Court stated:

"However, there is some overlapping and, even if there were not, it was held in *National Dryer Manufacturing Corp. v. The National Drying Machinery Co.*, 228 F. 2d 349, 108 USPQ 54, that the trademark owner will be protected in a field so closely allied to his business that he may reasonably be expected to enter into it."

## **2. Color.**

Efforts were made by appellees to distinguish the parties' dresses upon the basis of color; suggesting the existence of a concept of "California colors."

In examining, and self-servingly commenting upon, the colors in appellant's swatch book for its 1959 summer line, Exhibit 92, appellees' witness Mrs. Sachs stated that appellant's colors were dark, with twenty-five per cent being sold in black (RTR 397). Mrs. Sachs wore one of appellees' black dresses in the courtroom (RTR 372), and numerous of appellees' advertisement exhibits showed conclusively that black was one of its most frequently used colors, Exhibits I, J, K, L-2, and M (RTR 427-428). She testified that appellees could not exclude black from their line (RTR 428). Appellees' Exhibit FF showed that a particular garment was offered in the color navy. This was surprising in view of the testimony of appellees' expert witness Mr. Irving Singer, a fabric salesman, who said that he had not sold any navy in the last three or four years; "It is a dead issue out here [meaning California]" (RTR

341). Appellees found that dresses in such a non-“California color” as navy, are still in demand in California.

In comparing the color of appellees’ garment in its Exhibit L-1 (RTR 388) with a maize color swatch in appellant’s Exhibit 92, Mrs. Sachs testified that the colors looked similar (RTR 429). She also admitted that appellant’s Exhibit 92 showed pinks, whites, etc., just as were set forth in appellees’ own advertisements (RTR 429).

It is to be observed that the efforts of appellees’ witnesses Mrs. Sachs and Miss Jefferson to distinguish coloring were based upon appellant’s summer line, which was offered over a year before the appellees had registered their Articles of Partnership. Thus, there was absolutely no proof as to distinction in coloring based upon garments being currently offered by both parties. Mrs. Sachs did note, in answer to the District Court’s query, that both the East and the West, since 1959, have tended to use flashier or brighter colors.

Whether or not certain colors have ever been associated with any California manufacturers at any particular time in history is irrelevant and immaterial in this cause for at least two cardinal reasons:

**One:** Appellees failed to demonstrate that their own colors were distinguishable from those of appellant; and

**Two:** Any suggested unusual quality about California colors was denied by the testimony of appellees’ witness Mr. Morton J. Weishar, a May Co. buyer, who testified that the so-called “hot colors, the oranges, the yellows, the brighter tones,” were not limited to California (RTR 475) but that the East had gone in for the same colors and started to pick up these colors at least four years ago (RTR 476).

It is to be noted that appellees were not in existence at the time the East picked up such colors. Concurring tes-

timony by appellees' witness Miss Jefferson regarding colors used both in the East and the West is noteworthy:

“Q. Can you tell by looking at the garment whether it was manufactured in California or elsewhere?

A. Not exactly. They have certain characteristics, of course, of the brighter colors. You don't have so much in bright colors coming from the East as you do here. **But, of course, you couldn't tell exactly**” (R 281). (Emphasis ours.)

Consequently, appellees' own experts denied a color distinction and thus corroborated the import of Mrs. Sachs' testimony upon cross-examination concerning the actual lack of color distinction between the parties' dresses.

In the course of the trial the District Court took judicial notice of the transitory nature of dress colors and, inferentially, of the insubstantial basis for making a distinction thereon, in stating:

“\* \* \* I think that everyone here knows and anyone who would have anything to do with this case would know that colors are different each year. They come out with some dominant color, and how they ever settle on it, I don't know. But they do, and then they give old colors new names, and the whole thing is supposed to take on a new look each summer” (RTR 258).

In view of the foregoing, the appellant submits that the following finding of the District Court is without foundation:

“The court is persuaded that the colors used by plaintiff are less brilliant than the defendants use, but that this feature is not sufficient alone to distinguish the respective lines. However, it is in fact an element which has been a characteristic worthy of note” (R 47).

### 3. Size.

Appellant's dresses in its PAUL SACHS line are offered in sizes 10 to 20 (RTR 148), and in its DON SACHS line in sizes 8 to 18 (RTR 217). Appellees' dresses are produced and sold in sizes 8 to 18, Exhibit O. Appellees' witness Miss Jefferson admitted that the so-called "young missy" and the "missy" (misses) dresses both comprehend sizes 10, 12, 14, 16, and 18 (RTR 288), and appellees' witness Mrs. Sachs testified to the same coincidence of sizes (RTR 419).

### B. Similarity of Trade Channels.

In its Memorandum of Decision the District Court appeared to suggest that some distinction exists between the trade channels utilized by the parties for their dresses (R 48). A careful scrutiny of the said Memorandum and of the entire record does not reveal any fact whatever upon which such a distinction could rest. The District Court found, on an over abundance of proof, that the dresses of the parties are offered for retail sale in department stores and specialty shops (R 33, 37). This fact demonstrates that there is no distinction in trade channels. However, there are additional areas of coincidence with respect to the movement of the parties' dresses in commerce.

#### 1. At Wholesale.

Both of the parties maintain their own sales force (RTR 224, 513) for directly contacting the trade, with the District Court noting the sales accomplishments in the State of California of appellant's salesman Mr. Eddie Silk (R 34). Both of the parties exhibit their dresses at "markets", such as, particularly, the one held five times annually in the City of Los Angeles, California, at the Biltmore Hotel, which is sponsored by the Pacific Coast Travelers Association—see Exhibits Y and Z (RTR 103), which fact was noted in the District Court's Memorandum

of Decision (R 35, 38). Both parties maintain show-rooms for exhibiting their garments to the trade (R 33, 38). Accordingly, the parties operate identically in selling their dresses on the wholesale level. Whether or not either of the parties might utilize additional avenues of approach to the trade is without moment, since, generally, the marketing methods of a concern are dictated at any one particular time by budgetary considerations.

## **2. To the Same Stores.**

As established by the record, the dresses of both parties are sold to women through department stores and specialty shops. But, at the trial there was proof that both parties had sold their dresses to identical stores in California. Mr. Weishar testified for appellees that appellees' dresses had been purchased for resale by May Co. stores in the Los Angeles area, and sales of appellant's dresses to the same May Co. stores by appellant was established by invoices comprised in appellant's Exhibit 78 (RTR 260). Appellees sold dresses to the Style Shop in Salinas, California (RTR 545), while sales of dresses to that firm by appellant in the year 1960 were established by Exhibit 86 (RTR 260). Thus, without conscious, predetermined effort by appellant, the record showed sales to not just the same types of stores, but to the very same stores.

In this connection it is interesting to note that the record unequivocally established that the same store buyers customarily purchase misses dresses and young missy dresses. Appellees' witness Mr. Weishar testified that as a buyer for the May Co. his purchasing efforts encompass both misses and young missy dresses (RTR 449). Appellees' Exhibit GG, being an advertisement for appellees' dresses appearing in the Phoenix Gazette of March 1, 1962, indicated that these so-called young missy dresses of appellees were available at "Misses Dresses, Second Floor" (RTR 425). Appellees' mailing piece for its dresses,

Exhibit I, stated: "Att: Misses Dress Buyer." Mrs. Sachs, appellees' style coordinator, admitted that there were buyers who bought both the misses and the young missy dresses (RTR 420).

The offering for sale of the misses and young missy dresses of the parties in the same departments of stores, as evidenced by Appellees' Exhibit GG noted above, was corroborated by Appellant's witness Eddie Silk, who testified:

"In most cases a misses dress will be in the same department. In other words, a young misses can go in and find a dress in the same department as you call an old misses" (RTR 188).

Also, appellees' witness Mr. Weishar testified that in the May Co., to whom both parties have sold their dresses, the misses dresses and the young missy dresses were sold in the same department (RTR 449).

### **3. For Sale to Same Retail Customers.**

The fact that appellees' witness Mrs. Sachs could, in the estimation of plaintiff's expert witness Eddie Silk, be wearing a misses dress (RTR 158), which, in her estimation, was a "young missy dress" (RTR 374), should establish beyond doubt that the garments of the parties can be sold to the same individuals. Mrs. Sachs testified that the young missy could encompass an age bracket of from 19 to 40 (RTR 373); hence, such an age bracket, which comprehends youth as well as middle age, certainly includes ladies and misses styles. Appellees offered no evidence that misses dresses were only for those outside this age bracket. Since misses and young missy dresses are sold in the same departments, it is obvious that they are being offered to the same clientele. Appellees' witness Miss Jefferson testified that a thirty-year-old woman and a seventeen-year-old girl would buy the same dress (R. 295). There succeeded the following exchange:

“Q. (By Mr. Kalish) This does go a bit higher than 30, doesn't it, today?

A. And how” (RTR 295).

Thus, the testimony of Appellees' witnesses proved that the dresses of the parties did not appeal to different segments of the market.

#### 4. Sold in Overlapping Price Range.

The appellees' dresses are sold at wholesale in a price range which extends from \$6.75 to \$14.75, Exhibits E, I, L, and N, having some dresses thus selling at \$10.75, \$12.75, and \$14.75. Appellant's dresses are sold within a price range from \$10.75 up to \$39.75 (RTR 217), thus encompassing dresses wholesaling at \$10.75, \$12.75, and \$14.75, as well as higher prices, Exhibits 64, 65, 67, 68. Consequently, within important parts of both of their lines appellant and appellees have identical wholesale prices. The fact that appellees may have a lower price level than appellant and that appellant may have a higher price level than appellees, is without significance. The law is well developed on this point. Foremost is **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra. Therein the court stated:

“You cannot divide the clothing business into categories, according to the social group on which it may depend for patronage. It may well be that a purchaser of clothes chooses to go to one store, rather than to another, because it carries the type of clothes he likes, just as a person may go to a tailor who charges \$135 to \$150 for a suit of clothes, while another prefers to patronize one who charges \$75. But, just as both tailors are in ‘the tailoring business,’ regardless of the price, so are both businesses who sell ready-made clothing in the clothing business. To use a phrase made famous by an American humorist, just as ‘Pigs is pigs,’ ‘**Clothes is clothes.**’ They do not

cease to be such because they appeal to one social group rather than another. Nor do the persons engaged in selling them to one rather than another cease to be in the clothing business competitively. \* \* \* Ours is an unstratified society with constant mobility of persons. Absent a 'caste' system, there can be no 'caste' in merchandising. As prospective customers, 'the Colonel's lady and Judy O'Grady' (or their male equivalents) 'are sisters' (or brothers) 'under the skin.' "

In the case of **Chester Barrie, Ltd. v. Chester Laurie, Ltd.** (D. C. S. D. N. Y.—1960), 189 F. Supp. 98, 127 USPQ 255, the defendant's men's clothing was sold at a lower retail price than that of the plaintiff, but the court refused to give weight to such a distinction, stating:

"While defendant's garments presently are sold in retail price ranges substantially lower than those of plaintiff, it does not license defendants to **preempt the lower price ranges and foreclose plaintiff from changing its merchandising or pricing policies.** Additionally, changes in economic conditions may impel plaintiff to lower the price of its product and materially lessen the differential" (Emphasis ours).

See also **Chips 'N Twigs, Inc. v. Blue Jeans Corp. et al.** (D. C. E. D. Pa.—1956), 146 F. Supp. 246, 111 USPQ 373, wherein the garments manufactured and sold by defendant retailed at a lower price than similar garments produced by plaintiff. However, the court refused to recognize such a price differential as being a tool for avoiding confusion.

"An examination of the goods of the two manufacturers, the plaintiff and the defendant, which were produced at the hearing, clearly demonstrates that the plaintiff makes a far superior garment. Goods which are manufactured by Blue Jeans Corp. to be sold by the retailer for \$6.98 can be sold by the plain-



tiff only if they will bring the retail price of \$13.98 and higher. Even the one witness produced by the defendant admitted that the garments manufactured by the plaintiff were of superior quality and workmanship. Clearly, then, if by the actions of a newcomer in the field in the use of a deceptively similar name, and by manufacturing and selling similar articles of inferior quality the newcomer can take advantage of good will built up by the plaintiff over a period of years, and so confuse the public that members thereof will believe they are purchasing plaintiff's goods, irreparable harm must result to the plaintiff directly in its business and to the good will built up at great expense over a long period of years."

The District Court, although recognizing that price is another factor in determining relationship of the dresses of the parties, appeared to deny the significance of the price overlap as an element in the overall mosaic by making the following finding:

"The fact that the prices overlap did not establish that the respective lines sold in the same market. Neither does the fact that the defendants' garments are considered less expensive establish that they are in a different market."

Nevertheless, the fact that appellant's price range may extend beyond that of appellees does not, in view of the well established precedents, provide any basis upon which a distinction between the goods of the parties can be made.

##### **5. Trade Recognizes No Distinction.**

If there were an actual distinction between the dresses of the parties, then one would expect appellees' salesman to make the most of such distinction in selling appellees' dresses. However, appellees' salesman categorized appellees' dresses as either "misses dresses", Exhibit 94 (RTR 424), or as "inexpensive misses dresses", Exhibit

93 (RTR 423). In these particular exhibits, which were directories issued by the Pacific Coast Travelers Association at the "markets" held five times annually at the Biltmore Hotel in Los Angeles, appellees' dresses were included in the same categories as misses dresses. Also pertinent is Appellees' Exhibit CC (RTR 103). John Sachs, the general partner of appellees, testified as follows:

"Q. So far as you know, are the young missy dress manufacturers ordinarily and normally included in the same category in directories of markets as the misses manufacturers?

A. Yes, sir" (RTR 519).

With the keen competition among dress manufacturers, one would expect any difference to be emphasized by a manufacturer in order to set his dresses apart from those of his competition. But the trade observes no distinction.

In view of the fact that there is no apparent recognition of such a classification as "young missy" in the aforesaid directories or in any other trade publications put in evidence by appellees, it is submitted that objective evidence does not support a trade recognition of real difference.

## **6. Co-existence Geographical Distribution.**

### **a. California.**

The continuous sale of appellant's dresses in the State of California for many years prior to the inception of appellees and through the present time is clearly established. Appellant's Exhibits 78 through 88, inclusive, constituted specimens of invoices relating to sales of its dresses in California for the period 1952 through 1961 (RTR 260). These invoices were selected for the purpose of merely indicating extent of sales throughout California, the continuity of such sales, and not the volume of sales (RTR 260). Observing appellant's invoice exhibit to-

gether with a box of invoices not placed in evidence, the District Court stated:

“\* \* \* obviously you must have shipped a lot of dresses [into California]” (RTR 262).

The District Court found that appellant had sold its dresses in California in an annual volume of at least \$100,000 at wholesale during the ten years that appellant's representative Eddie Silk had handled its line, and that during such period of time he had sold appellant's dresses in at least seventy-five California cities, with an annual distribution of between sixty and seventy California cities (RTR 114-115), and during the aforesaid period Mr. Silk had sold appellant's dresses to “about 300” different accounts in the State of California (RTR 114). In certain of appellant's national advertisements in Vogue Magazine, Exhibits 26, 28, and 30 (RTR 95, 233), appellant gave “store credits” to stores in Sacramento, Glendale, and Los Angeles.

Appellees' partnership, which was not formed until late 1960, is a Los Angeles firm, having its principal place of business and showroom in downtown Los Angeles (RTR 515). That it has sold its dresses in the City of Los Angeles is evident from the testimony of its witnesses, Mr. Weishar of the May Co., and Miss Jefferson, who operates a specialty dress shop. John Sachs testified that his firm had sold its dresses to between 175 and 200 accounts in California and that about seventy-five per cent of its business, on a dollar-volume basis (although the actual volume was not given), was transacted with stores in the State of California (RTR 541).

#### **b. Nation-wide.**

The testimony of appellant's president, Mr. Joseph Abrams, demonstrated that plaintiff has sold its dresses throughout the entire United States since 1942. The national character of appellant's business is further evi-

denced by its consumer advertising in nationally distributed magazines, such as Vogue, Mademoiselle, and Charm magazines; and its advertisements in Vogue, Exhibits 25, 26, 27, 28, 29, 30, 32, 33, 34, show this character most convincingly. In these advertisements "store credits" are given to stores located in Texas, Indiana, Mississippi, Pennsylvania, Missouri, California, Tennessee, Florida, Colorado, Georgia, Nebraska, etc. Furthermore, appellant maintains showrooms in the cities of New York, New York; Dallas, Texas; and St. Louis, Missouri (R. 34). As shown by the testimony of both Mr. Eddie Silk and Mr. Joseph Abrams, their respective personal sales efforts on behalf of appellant constitute a remarkable geographical coverage. Appellees gave testimony that their dresses were sold in forty-one states (RTR 515). Accordingly, it is evident that the geographical areas of operations of the parties coincide.

### **C. Direct Competition Not Requisite for Relief.**

In view of the foregoing, it is submitted that the dresses of the parties are, to all intents and purposes, merchandise of the same class and type, both as to physical characteristics and the manner in which the same are offered for sale. To modify the expression "**Clothes is clothes**" of the District Court in the **Brooks Bros.** case, supra (See quotation, page 23), one should certainly be able to say, without contradiction, that a woman's ready-to-wear dress is a woman's ready-to-wear dress.

The test is not whether the merchandise of the parties is physically identical, but whether or not the same are so related as to be capable of emanating from a single source of origin. This criterion is broader than that applied by the District Court, and is one which is in keeping with the realistic practices of the market place. This criterion is, furthermore, one which assures adequate protection to a trader's business. As the cases will show, it is not necessary that the merchandise of the parties

be in immediate, direct competition, wherein a customer might purchase the product of one trader for that of another, in order for relief to be obtained. **Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.**, supra. The law is not that narrow. In **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra, the court stated:

“For this reason whatever may be the rule in other circuits, the rule declared by our Ninth Circuit Court of Appeals is that competition is not necessary \* \* \*. Even if the goods be not in competition, the law protects a merchant in his interest ‘in other goods, services or businesses which, in view of the designation used by the actor, are likely to be regarded by prospective purchasers as associated with the source identified by the trademark or tradename.’ ”

In **Academy of Motion Picture Arts and Sciences v. Benson** (Calif.—1940), 104 P. 2d 650, 46 USPQ 488, the court stated:

“But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses. In situations involving the use of proper surnames in non-competitive businesses it has been held that where confusion was shown as likely to result the relief should be accorded to the complaining party.”

In **Fancee Free Mfg. Co. v. Fancy Free Fashions, Inc.** (D. C. S. D. N. Y.—1957), 148 F. Supp. 825, 112 USPQ 359, the plaintiff produced various articles of women’s intimate wearing apparel, such as brassieres, girdles, foundation garments, etc., whereas defendant sold lounging wear, such as brunch coats, dusters, house coats, two-piece lounge suits, slacks and cover-alls, but did not manufacture or sell underwear or related merchandise. In determining that no distinction could be made between the merchandise of the parties, the court stated:

“The issue as to whether the goods sold by the plaintiff and the goods sold by the defendant are related goods is an issue of fact. The evidence shows that articles of intimate wearing apparel as sold by the plaintiff are frequently sold in the same departments of stores which sell items of lounge wear as sold by the defendant. In some instances the same buyer for a department store will buy both underwear and lounge wear. Certainly it requires little knowledge of merchandising practice to understand that a woman purchaser or wholesale buyer who had bought ‘Fancee Free’ slips or pajamas, might well conclude that a lounge robe or brunch coat bearing a similar trademark might come from a similar source. **Though not in competition with each other, these items of feminine apparel are sufficiently related for there to be such a likelihood of confusion as to entitle plaintiff to protection of its trademark.**” (Emphasis ours.)

In this connection, see **Williamson-Dickie Mfg. Co. v. Davis Mfg. Co.**, supra, wherein it was stated:

“\* \* \* certainly the manufacturer of one kind of boys’ clothing cannot escape a charge of infringement because the plaintiff is principally engaged in manufacturing another kind.”

In **Youthform Co. v. R. H. Macy & Co., Inc.** (D. C. N. D. Ga.—1957), 153 F. Supp. 87, 114 USPQ 62, the plaintiff produced principally brassieres, while the defendant produced principally slips. However, such distinction was not sufficient to prevent the court from holding a likelihood of confusion by reason of the use of the respective trademarks on such goods. The court aptly noted:

“As stated above, plaintiff and defendant are not competitors, as plaintiff primarily sells brassieres and defendant primarily sells slips, etc. However, as shown by many of the advertisements placed in evidence, both brassieres and slips show the female form

clad in both a brassiere and a slip, which connects the two together in the public mind. Furthermore, each garment is sold largely in the same stores, though frequently at different counters.”

In **Barbizon Corp. v. Hollub** (N. Y. Sup. Ct.—1943), 41 N. Y. S. 2d 117, 57 USPQ 201, plaintiff used its trademark on women’s underwear, whereas defendant used its trademark on cotton dresses. In enjoining the actions of the defendant, the court stated:

“The products of the plaintiffs and defendants are frequently sold and distributed in adjacent sections of stores. **When so sold, a common origin might easily be assumed by the public.**” (Emphasis ours.)

In **Lou Schneider, Inc. v. Carl Gutman & Co.** (D. C. S. D. N. Y.—1946), 69 F. Supp. 392, 70 USPQ 490, plaintiff used its trademark on ladies’ and young misses’ coats and suits, whereas defendant utilized its mark on sweaters; women’s knitwear; ladies’, juniors’, and misses’ polo shirts, blouses, bed jackets, and suits. The court, in denying defendant’s contention that the distinction in merchandise would avoid confusion, stated:

“Here the two classes of goods are worn by the same people, are sold in the same stores, advertised in the same publications, and sold to the same class of purchasers. Clearly, there is obvious possibility of confusion. They are also included in the same classification by the Patent Office.”

In **Swarthmore Classics, Inc. v. Swarthmore Junior** (D. C. S. D. N. Y.—1959), 81 F. Supp. 917, 80 USPQ 159, the plaintiff dealt in women’s blouses, while defendant sold women’s suits and dresses. The defendant did not sell blouses, nor did plaintiff sell women’s suits and dresses. The court stated:

“Having a trademark established by consistent use and advertising, defendants are entitled to prevent plaintiff from using a confusingly similar mark or

name in connection with **the same or related goods in the same markets.** I have found that while there is no proof that any member of the public has been misled into the belief that plaintiff's blouses originate at the same source as defendants' dresses, it is probable that such a false belief will be generated." (Emphasis ours.)

The court therein did find that the parties sold in the same geographical areas; that their wares were bought by common retail purchasers and to some extent by common wholesale purchasers; that their wares were marketed through the same kind of retail channels and sometimes in the same stores; and that the function of plaintiff's and defendant's goods were closely related. The extreme pertinency of this case is apparent.

In another case germane to this issue, **Kay Dunhill, Inc. v. Dunhill Fabrics, Inc.** (D. C. S. D. N. Y.—1942), 44 F. Supp. 922, 53 USPQ 231, the plaintiff was engaged only in the business of producing and selling dresses for ladies, misses, and juniors, while the defendant was engaged in the production and sale of fabrics. But defendant was enjoined from utilizing its mark in conjunction with its fabrics from which dresses were made. In **Carlisle Shoe Company v. Societe Anonyme: Roger Fare & Cie** (CCPA—1960), 278 F. 2d 519, 126 USPQ 54, the defendant used its trademark upon gloves, whereas the plaintiff utilized its mark on ladies' shoes. The court, in denying any avoidance of confusion by distinction of merchandise, stated:

"However, it was the examiner's position that ladies' shoes and gloves are closely related, generally sold in the same stores, and frequently purchased and used together as accessories to complement a particular costume. We agree with the examiner that the goods are so related that their sale by different parties under substantially similar marks would likely lead purchasers to suppose that they emanated from the same source."



In **General Shoe Corporation v. Hollywood-Maxwell Co.** (CCPA—1960), 277 F. 2d 169, 125 USPQ 443, the court affirmed the denial of registration of appellant's trademark for use on shoes and hosiery in view of the prior registration of the same mark by defendant on brassieres. In support of its position, the court quoted the following passage from a prior decision:

“\* \* \* Both are within the general class of wearing apparel. They are bought by the same class of people; it is a matter of common knowledge that both shoes and clothes are sold in country stores throughout the nation, and appellant's counsel admits that a similar sales policy exists to some extent in our cities, although he states, as no doubt the fact is, that in cities, generally speaking, clothing and shoes are sold in separate stores.”

The following statement by the court in this same case demonstrates marked recognition of present-day commercial practices:

“Again, if it were really a matter of common knowledge that shoe manufacturers do not ordinarily manufacture other items of apparel and vice versa, there would be no problem. However, there is no evidence to support that statement, and we hardly think it can be accepted as a fact. Indeed, in view of the current wave of industrial mergers and resultant diversification, it is difficult to know with certainty just who is manufacturing what.”

The New York State courts have also recognized the same standard in cases of this type. In **Sullivan v. Ed Sullivan Radio & T. V., Inc.** (N. Y. App. Div.—1956), 1 App. Div. 2d 609, 110 USPQ 106, the court stated:

“It is quite clear that, at the present time at least, there is no direct competition between appellant and respondent. However, both operate in the same general field and this court has consistently held that it

is not essential for parties to be in competition with each other in order to sustain an injunction \* \* \*.”

Also, of interest is the recent case of **Drexel Enterprises, Inc. v. Colby** (D. C. S. D. Calif.—1963), Docket No. 1623-61-Y (138 USPQ 1), wherein the Court held that the louver-shutters, doors, room dividers and screens were so closely related to the furniture of plaintiff that the use by defendant of the same trademark as the plaintiff constituted trademark infringement and unfair competition. See also **Harvey Machine Co., Inc. et al. v. Harvey Aluminum Corporation** (N. Y. S.—1957), 9 Misc. 2d 1078, 113 USPQ 437, and **National Design Center, Inc. v. 53rd Street Design Center, Inc.** (N. Y. S.—1960), 24 Misc. 2d 545, 203 N. Y. S. 2d 517, 125 USPQ 596. In **Lady Esther, Ltd. v. Flanzbaum** (D. C. D. R. I.—1942), 44 F. Supp. 666, 54 USPQ 25, the court held that defendant’s use of “Lady Esther” in connection with ladies’ shoes and stockings unfairly competed with plaintiff’s use of “Lady Esther” on face powder, face creams, and the like. Therein the court quoted from a pertinent precedent:

“ ‘The normal potential expansion of the plaintiff’s business may be forestalled. \* \* \* It may be tarnished by the use of his mark upon an inferior product \* \* \*. A false impression of a trade connection between the parties may be created, possibly subjecting the plaintiff to liability or to the embarrassments of litigation, or causing injury to his credit and financial standing.’ ”

In view of the foregoing, it is not necessary that the goods of the parties be identical, and in direct competition, for an aggrieved party to prevail. The law of unfair competition and trademark infringement is not so limited. The sole standard is whether the goods are so related as to be capable of emanating from a single source of origin. In the present case it is submitted that the dresses of the parties are so related.

#### D. Expansion Test for Relationship of Goods.

Another facet of the “source of origin” concept often considered by courts in determining the relationship of the goods of the parties is what might be called the “expansion test”, namely, whether the goods of a defendant are of such character that one would expect a plaintiff, in view of its current operations, to normally expand into the handling of such goods. This concept is well expressed in **Williamson-Dickie Mfg. Co. v. Davis Mfg. Co.**, supra, wherein the court stated:

“A trademark owner will be protected in a field so closely allied to his business that he may reasonably be expected to enter into it.”

In the case of **Richard Hudnut v. Du Barry of Hollywood, Inc.** (D. C. S. D. Calif.—1960), Docket No. 1345-59-MC, 127 USPQ 486, 50 T. M. Rep. 1219, the District Court recognized that plaintiff, although a manufacturer of toilet goods and cosmetics, was to be protected as well “upon such other goods as might naturally be expected to come from the plaintiff.” See also **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra, and **Del Monte Special Food Company v. California Packing Corporation** (CCA 9—1929), 34 F. 2d 724, 3 USPQ 15. In **L. S. Starrett Company v. Aaron Machinery Co., Inc.** (D. C. E. N. Y.—1958), 160 F. Supp. 805, 117 USPQ 178, the court stated:

“If the product on which the trademark is being used by another is fairly within the normal field of expansion of the registrant’s business, the latter is entitled to relief.”

In **Henry Muhs Co. v. Farm Craft Foods, Inc.** (D. C. E. D. N. Y.—1941), 37 F. Supp. 1013, 49 USPQ 162, the court stated:

“The modern doctrine is certainly to grant to one who has established a trademark and good will in connection therewith, the use thereof in any reasonable extension of its business.”

Appellant submits that the so-called "young missy" dresses of appellees if they are distinguishable from appellant's dresses, fall within a reasonable and logical extension of appellant's business. The District Court, in its Memorandum, made the following pertinent statement:

"When a manufacturer seeks to vary its line by appealing to women of other specifications than those catered to in an established line, it customarily gives the line a new name, as did plaintiff, when it established the 'Don Sachs Original' line to capitalize on the good will established by the original 'Paul Sachs Original' line."

Thus the District Court recognized that a dress manufacturer will not necessarily remain steadfast to garments of a single type but will add new lines, just as appellant added the "petite" line to its "misses" line. Therefore, for appellant to extend its dress business to encompass the so-called "young missy" dresses is logical, particularly when one notes that the young missy dresses would be sold to the same store buyers who buy misses and petite dresses and that they would be sold in the same store departments. A manufacturer such as appellant would most easily, and with minimum expense, enter into the production and sale of such a line if, arguendo, such a line would be distinct. One is not considering here the possibility of expansion into the manufacture of shoes, hats, gloves and the like, but merely the manufacture of a ready-to-wear dress by an established, recognized ready-to-wear dress manufacturer. The District Court, in holding that the dresses of the parties are not identical, sought thereby to create a base for further finding that appellees could "carve out an area of distinction." It is submitted that such a holding would condone the interposition of appellees into the path of expected expansion of appellant and thereby forestall the natural growth and development of appellant's business along the path which it has heretofore followed. Ap-

pellant is entitled to develop its business and to add such lines as it may, just as it added the DON SACHS line, without being circumscribed by appellees' operations. It is implicit in the District Court's decision that if the court had found that appellant did produce and sell a garment which the court considered a young missy dress, the court would have found in favor of appellant. Hence, if appellant were to expand its business into young missy dresses, it would then, in view of this holding, violate rights of appellees. When viewed from the standpoint of what might be determined the "expansion test," it is obvious that the dresses produced by appellees are within the field of the normal expansion of appellant, assuming that they are not already, and have not always been, in appellant's operations.

#### **E. Patent Office Classification.**

The Court will undoubtedly take judicial notice of the fact that the Patent Office has developed a classification system for merchandise so that trademarks are registered within the particular class for the identified merchandise. All articles of wearing apparel are comprehended in Class 39, Clothing. Accordingly, appellant's registrations for its trademarks PAUL SACHS Original and DON SACHS, Exhibits 1 and 2, are registered in Class 39, as is evident from the face of the certificates. In the former registration appellant's merchandise is described as "Street dresses and suits of silk, wool, rayon and cotton, and combinations thereof," whereas the merchandise in the latter registration is merely described as "Ladies' and misses' dresses." Obviously, the dresses of appellees would fall in the same class in the United States Patent Office. This fact, although in itself not fully decisive, does corroborate the objective recognition of the substantial identity of the garments involved in this proceeding.

In passing it should be noted that neither of appellant's registrations contain any statements with respect to the

description of the goods which would serve to limit the same to particular styles, colors, patterns, sizes, or prices. As stated, the merchandise is described, in the one case, merely as "Street dresses," and in the other case, "Dresses." The District Court, by seeking to differentiate between the dresses of appellees and those of appellant upon the grounds of style, color, price, and the like, is circumscribing the scope of appellant's registrations in a most damaging manner, limiting the dresses to certain styling, colors, etc., but which the District Court did not define. The holding of the District Court in this regard does not take into account the ever-changing character of styles but assumes a permanent, static condition, which does not conform with reality, and which, in effect, would alter the protection provided appellant's trademarks by statutory law.

### III.

#### THE TRADEMARKS OF THE PARTIES.

##### **A. Consideration of Dominant Portions of Trademarks.**

It is evident from its Memorandum of Decision that the District Court viewed appellant's trademarks as "Paul Sachs Original" and "Don Sachs Original," and that of appellees as "Sachs of California"; and upon such basis considered the trademarks as a whole, although the District Court stated: "Dissection is explanatory of a conclusion derived from the whole mark" (R 50). It is apparent that the District Court failed to ascribe proper weight to those portions of the marks of the parties which serve, to identify the respective goods, and was unduly influenced by words which are descriptive and incapable of trademark significance. Before considering the anatomy of the marks of the parties, it is well to recognize that although courts have indicated that trademarks should be considered in their entireties such a proposition has not prevented the same courts from noting the dominant or

major portions of the marks involved and determining confusing similarity from a comparison of such portions. Thus, in the case of **Saxlehner v. Eisner & Mendelson Company** (Sup. Ct., 1900), 179 U. S. 19, 45 L. Ed. 60, 21 S. Ct. 7, it was stated:

“One does not have to make a copy of another’s entire trademark in order to infringe it, if what he does copy is enough to cause confusion.”

This same view was expressed in a case decided by this Court, **Mershon Company v. Pachmayr** (CCA 9—1955), 220 F. 2d 879, 105 USPQ 4. A similar statement was made by the court in the case of **Lou Schneider, Inc. v. Carl Guttman & Co.**, supra:

“It is not necessary to constitute an infringement that every word of a trademark should be appropriated. It is sufficient that enough be taken to deceive the public.”

Title 15, United States Code, Sec. 1114 (1), as indicated above (page 12), does not require an exact and entire copying of a trademark in order to constitute infringement, as it provides that a “colorable imitation” may be an infringement:

“Colorable imitation of part of a valid mark of another constitutes infringement where, as here, ‘the part \* \* \* taken identifies the owner’s product without the rest.’ ” **Chester Barrie, Ltd. v. Chester Laurie, Ltd.**, supra.

Note also the following pertinent statement from Callmann, **Unfair Competition and Trademarks**, 2nd Edition; Callahan & Company, 1950:

“The judge, of course, must look at the mark as a whole, but that does not deny him the right to analyze its different features so that he may properly consider the characteristics of the mark. Although words are to be considered in their entirety, that touchstone does not require that equal significance must, in all cases,

attach to every part of a mark; such a holding could result in the destruction of valuable trademarks, for a defendant could invoke the simple expedient of adding descriptive words to its mark. If one word or feature of a composite mark dominates all others, that should be accorded greater force and effect than the other parts of the mark \* \* \*.” (Emphasis ours.)

Most apt in this regard is the case of **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra, wherein the court, in holding the defendant’s name to constitute unfair competition in view of plaintiff’s name, stated:

“Consequently, the courts, in both trademark and unfair competition cases, have held that where the **dominant portion** of a trademark, trade name or business has become identified in the mind of the public with the first user, he will be protected in the use of the name, even against a newcomer having the same surname.” (Emphasis ours.)

It will thus be noted that the court in that case considered only the word “Brooks” in each of the parties’ names and hence was not influenced by the accompanying verbiage. Also appropriate is another case decided by this Court, **Safeway Stores v. Dunnell** (CCA 9—1949), 172 F. 2d 649, 80 USPQ 115, wherein the use of the term “Safe Way” upon toilet seat covers was held to be confusingly similar to appellant’s trade name “Safeway Stores, Inc.,” on the ground that the term “Safe Way” constituted a substantial appropriation of the appellant’s corporate name:

“We regard Dunnell’s use of the words ‘Safe Way’, whether with or without the hyphen, to be a similar appropriation of the word ‘Safeway’, a part of Stores’ corporate name ‘Safeway Stores, Inc.’”

Another interesting case is **Swarthmore Classics, Inc. v. Swarthmore Junior**, supra, wherein the court, despite any distinction between the word “Classics” and the word “Junior,” considered the marks to be confusingly similar



in view of the word "Swarthmore." As discussed above, the merchandise of the parties was not identical. A further very pertinent case is **Pikle-Rite Co., Inc. v. Chicago Pickle Co., Inc.** (D. C. N. D. Ill.—1959), 171 F. Supp. 671, 121 USPQ 128, wherein the trademark "Pol-Pak" was held to infringe the trademark "Polka" as used upon pickles. The court stated:

"To constitute infringement, it is not necessary that the defendant appropriate the whole of plaintiff's mark, and the imitation need only be slight if it attaches to the **salient feature** of plaintiff's mark." (Emphasis ours.)

In that case the court found that the salient part of defendant's brand name, namely "Pol", constituted the dominant portion of plaintiff's trademark. Also apt is the case of **Kay Dunhill, Inc. v. Dunhill Fabrics, Inc.**, supra, wherein the use of "Dunhill" was held to unfairly compete with and constitute an infringement of "Kay Dunhill", the former being used on fabrics and the latter on dresses.

Another guide in considering the dominant portions of trademarks is the fact that the courts have consistently recognized that descriptive words or disclaimed words have no trademark significance, so that the remaining portion of the mark is the dominant portion. In **Hygienic Products Co. v. Huntington Laboratories, Inc.** (CCPA—1943), 139 F. 2d 508, 60 USPQ 205, the court held the trademarks "Toilet-San" and "Sani-Flush" to be confusingly similar. The court considered the word "Toilet" to be descriptive as used in the appellant's mark and hence having no trademark significance, and therefore compared the dominant portions of the marks, namely, "San" and "Sani". The court cited as an authority the case of **Saxlehner v. Eisner & Mendelson Company**, supra. An earlier, consistent holding is found in the case of **American Brewing Company, Inc. v. Delatour Beverage**

**Corporation** (CCPA—1938), 100 F. 2d 253, 40 USPQ 173. In that case the court noted a statement made in an earlier case which is most apt:

“If all that a newcomer in a field need do in order to avoid the charge of confusing similarity is to select a word descriptive of his goods and combine it with a word which is the dominant feature of a registered trademark so that the borrowed word becomes the dominant feature of his mark, the registered trademark, made valuable and outstanding by extensive advertising and use, soon becomes of little value and, of course, each of the subsequent imitating trademarks (and there would be many) is of value only to the extent that its users are trading on the good will of the owner of the original registered mark [Bon Ami Co. v. McKesson & Robbins, Inc. (CCPA—1938), 93 F. 2d 915, 36 USPQ 260].”

As will be developed hereinbelow, there could be no more appropriate statement which succinctly sets forth the situation in this cause.

In **Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.** (CCPA—1958), 253 F. 2d 431, 117 USPQ 213, the court, in recognizing that the portion “Vita” of appellee’s registered trademark “Vita-Slim” was disclaimed, stated:

“It seems evident, therefore, that ‘Vita’ cannot properly be regarded as the principal or dominant part of appellee’s mark. \* \* \* In our opinion ‘Slim’ seems the dominant part of appellee’s mark ‘Vita-Slim’ and the concurrent use of these two marks on identical goods would be likely to lead to confusion in trade.”

A more recent pertinent case is **Elizabeth Kent Cosmetics, Inc. v. G. B. Kent & Sons, Ltd.** (CCPA—1962), 309 F. 2d 775, 135 USPQ 327. Therein, the applicant utilized “Elizabeth Kent” on various cosmetic preparations,

whereas the registrant used the trademark “Kent” on brushes. In holding the marks to be confusingly similar, the court sustained the viewpoint of the Board of Appeals, as follows:

“The term ‘KENT’ is the sole feature of one of G. B. Kent’s registrations and the dominant feature of the other, and considering that this term likewise constitutes an essential, if not the most distinctive, feature of applicant’s mark [Elizabeth Kent], it is concluded that there is at least a reasonable likelihood of confusion in trade.”

Of certainly undoubted interest to this Court is the case of **Wohl Shoe Co. v. Elder** (Com. Pats.—1951), 90 USPQ 144, which was an opposition proceeding in the Patent Office. The opposer’s marks were “Connie” and “Connie Chic Creations” as used on shoes, while the applicant’s mark was “ANOTHER Miss Connie Original” as used on women’s and children’s pajamas, slippers, housecoats, brasieres, etc. In deeming the marks to be confusingly similar, the Commissioner noted the applicant’s argument that marks are to be considered in their entirety, but held that when marks are so considered, every part of the marks is not necessarily of equal importance or need be given equal weight.

The Commissioner stated:

“\* \* \* it being well settled that, where, as here, a conspicuous and essential feature of the applicant’s mark is the same as the opposer’s mark, the inclusion of additional words or features having no trademark significance is not sufficient to differentiate them.”

Therefore, the question as to confusing similarity of the marks of the parties upon their respective merchandise should be considered in accordance with the standards and criteria set forth by the foregoing precedents.

Another recent case most apt is **Radiator Specialty Company v. Ladd**, Comr. Pats. (D. C. Dist. Col. 1963),

138 USPQ 284, wherein the Court held the trademarks “Motor-Medic” and “Auto Medic” to be confusingly similar upon the ground that the words “Auto” and “Motor” have very little trademark significance as applied to motor fuel additives and that:

“The most significant and prominent phase of both of the above-mentioned marks is the word ‘Medic’, and it would be very likely that prospective purchasers would be more likely to remember the prominent feature as indicating origin of the goods.”

Additionally, the Court will appreciate that a side-by-side comparison of the marks of the parties is not a proper standard. Prospective purchasers are not always afforded the opportunity of making such comparisons. **Pikle-Rite Co., Inc. v. Chicago Pickle Co., Inc.**, supra; **G. D. Searle & Co. v. Chas. Pfizer & Co., Inc.**, supra; **Standard Oil Company v. Standard Oil Company** (CCA 10—1958), 252 F. 2d 65, 116 USPQ 76; **Harold T. Ritchie, Inc. v. Chesebrough-Ponds** (CCA 2—1960), 281 F. 2d 755, 126 USPQ 310; **Radiator Specialty Company v. Ladd, Comr. Pats.**, supra.

## B. Appellant’s Trademarks.

### 1. The word “Original”.

The District Court found that the word “Original” constituted an element of each of appellant’s trademarks, as “Paul Sachs Original” and “Don Sachs Original” (R 36, 37). Thus, the District Court considered the word “Original” to be an inseparable, vital component of each of appellant’s trademarks.

The District Court failed to specifically find that the word “Original” as so used with PAUL SACHS and DON SACHS has invariably been in a different style or manner of presentation from that of the accompanying name and has been physically separated from such marks, as evidenced, for example, by appellant’s labels, Exhibits 3,

4, 5, and 6. From a study of the District Court's Memorandum of Decision, it would seem that the word "Original" was presented in each trademark with an emphasis and importance equal to the other words therein, which inference is contrary to fact. Interestingly enough, the District Court noted, with respect to the word "Original" as set forth in Certificate of Registration No. 502,925 for the trademark PAUL SACHS Original: "By disclaimer the word was not eliminated from the trademark (R 36)."

Surely this Court will take judicial notice that the word "Original" or "Originals" is widely used in the women's fashion field, and especially in the clothing field. A cursory examination of Appellees' Exhibits BB, CC, H, J, KK, LL (RTR 103, 410), as well as the Pacific Coast Travelers Association's Market Week booklets Exhibits Y, Z and AA (RTR 103), reveals the widespread use of the word "Original" or "Originals" in the women's wearing apparel field. It is clear that there can be no distinctiveness inherent in such a term when so used, just as there could be trademark significance in such descriptive, widely used words as "Modes", "Creations", "Classics", "Fashions", and the like.

Although not bound, it is believed that this Court will note with interest rulings of the United States Patent Office with respect to trademarks, in view of the acknowledged expertise of the Patent Office in such matters. Thus, the Court's attention is directed to **Ex Parte Julette Originals** (Com'r Pats—1947), 74 USPQ 211, wherein the application to register "Julette Originals" as used on dresses was rejected in view of the prior registration of "Julette" as used on men's, women's and children's sleeping garments and underwear. The Commissioner stated:

"\* \* \* the word '**Originals**' when used in connection with dresses has little, if any trademark significance, and that applicant's proposed trademark is dominated by the word 'Julette'."

Of interest is **Le Roi Hosiery Co., Inc. v. Champion** (Com'r Pats—1957), 114 USPQ 135, wherein the trademark “La Roy Originals” as used on ladies’ shoes was considered confusingly similar to the trademark “Le Roi” as used on hosiery. The Commissioner stated:

“So far as we are here concerned, La Roy and Le Roi are the same in sound and in commercial impression; and the word ‘**Originals**’ adds nothing by which they would be likely to be distinguished.” (Emphasis ours.)

It is submitted that the word “Original” or “Originals” is obviously used in lieu of the more commonplace word “dresses,” or, as in the footwear field, in lieu of the word “footwear.”

The lack of distinctiveness in the word was brought out by the testimony of witnesses for both parties, as note the following testimony of appellees’ witness Miss Jefferson:

“Q. You testified a little while ago to a very remarkable familiarity with names of firms in the wearing apparel field. I would like to draw upon your knowledge and ask you whether or not you ever heard of the use of the word ‘Originals’ in the corporate name of any firm in the dress field.

A. Yes, of course.

Q. Would you say it was rather widely used throughout your 32 years’ experience?

A. Quite a bit. Quite a bit” (RTR 294).

Appellant’s expert witness Eddie Silk testified as follows with respect to the use of the word “Originals”:

“A. It is on everything. I mean this is a very loosely used word in our business, in our trade. All throughout our market week book you have the word ‘Originals’ after names, just to dress up the label.

Q. Does it have any significance?

A. It has lost its significance because of the way it is used” (RTR 102).

Interestingly enough, both Mr. John Sachs and his wife, Mrs. Hope Sachs, testified that they had once worked for a firm known as Lou-Ette Originals (RTR 380), so that they obviously are equally aware of the widespread, common use of the designation "Originals" in the dress field. Appellant's witness Eddie Silk, in his ill-starred business venture, likewise demonstrated the common use of this term, inasmuch as he had incorporated same in the label, Exhibit 89 (RTR 73), which he affixed to his merchandise. Therefore, from the standpoint of trade practice alone, the term "Original" cannot be considered as adding anything to either of appellant's trademarks.

Furthermore, the District Court, in recognizing the disclaimer in Registration No. 502,925, Exhibit 1, failed to appreciate the significance of such disclaimer.

In **Wohl Shoe Co. v. Elder**, supra, the trademark "Another Miss Connie Original," with "Original" being disclaimed, was considered confusingly similar to "Connie." In referring to the examiner's opinion, in which the Commissioner concurred, he stated:

"It was his [the examiner's] view that the words 'Another' and 'Original' in the applicant's mark are obviously lacking in trademark significance, the word 'Original' being disclaimed and also having a well-defined meaning with regard to the applicant's garments \* \* \*."

The disclaimed portions of registered trademarks can never be considered the dominant portion of such marks. See also **Bellbrook Dairies, Inc. v. Hawthorn-Melody Farms Dairy, Inc.**, supra; **American Brewing Company, Inc. v. Delatour Beverage Corporation**, supra. Furthermore, the lack of importance of such word to appellant and its non-reliance thereon for purposes of distinction is evidenced by its failure to use such word in either its trademark or its corporate name on various occasions; for example, see Exhibits 10, 11, 12, 13; 25 through 30, inclusive; 32, 33, 34, 53a to 53f, inclusive. The omission

of the word "Original" from Certificate of Registration No. 708,120, Exhibit 2, even though the specimens of the labels submitted to the Patent Office, Exhibit 5, for such registration, carried the word "Originals," shows that the Patent Office had ceased to regard such portions as forming a part of the mark and therefore granted the registration for the term DON SACHS alone, even though appellant has always used the label, Exhibit 2, for its DON SACHS mark.

In the case of **Jays, Inc. v. Jay-Originals, Inc.** (Mass.—1947), 75 N. E. 2d 514, 76 USPQ 238, the name "Jay-Originals, Inc." as used in the business for manufacturing women's sportswear was considered confusingly similar to the plaintiff's name "Jays" for its single retail store. In arriving at its holding the court found that the term "Jay" was an appropriation of an essential part of the plaintiff's name, and thus gave no weight to the word "Originals" as providing a basis for distinguishing the marks.

In its Memorandum of Decision the District Court in the present case adopted a position which is completely contrary to the above discussed precedents, as well as to the realities of the wearing apparel industry, and has indicated that the word "Original" is of significance and serves the purpose of a trademark in appellant's mark (R 48). Therefore, the District Court has ascribed significance and distinctiveness to a commonplace, descriptive word of which is altogether incapable.

## **2. SACHS the Dominant Portion of Appellant's Trademark.**

The District Court found as a fact that the word "Sachs" in appellant's trademarks had not been given any emphasis or dominance over the Christian portion of the marks, namely, "Paul" and "Don", as both names had been set forth in the same style and letter as the surname (R 36). Thus, the District Court laid stress



upon the manner of presentation of the marks for the seeming purpose of holding that SACHS was not dominant over Paul or Don. From the discussion hereinabove presented, the word "Original" as used by appellant is of no moment trademark-wise, since it is descriptive. However, utilizing the District Court's criterion based on manner of presentation, it would seem that the District Court would have, to have been consistent, considering the word "Original" as having no or at least minor significance in view of the fact that the word was at all times used in a completely subordination manner to the trademarks PAUL SACHS and DON SACHS and that it appeared in a different and smaller style of lettering, for example see Exhibits 1, 2, 3, 4, 5, 6, as well as all advertisement exhibits. Hence, the District Court should have at least found PAUL SACHS and DON SACHS to be the dominant portions of appellant's trademark if only from an appearance standpoint. Appellant contends that if the District Court had so properly concluded, a holding of confusing similarity would have ensued. In view of certain of the above-discussed precedents, as wherein "Dunhill" was held confusingly similar to "Kay Dunhill (**Kay Dunhill, Inc. v. Dunhill Fabrics, Inc.**, supra); and "Elizabeth Kent" and "Kent" confusingly similar (**Elizabeth Kent Cosmetics, Inc. v. G. B. Kent & Sons, Ltd.**, supra), it is evident that the marks of the parties are confusingly similar.

Appellant urges that the word "SACHS" is the true dominant, salient feature of its trademarks, since such name is common to both of its marks and, thus, is the one which establishes the relationship there between. As appellant's advertisements, Exhibits 25 to 30, inclusive, 32 to 34, inclusive, reveal, it was appellant's aim to develop a family of related trademarks, and, thus, the common surname Sachs was the element to evidence this underlying relationship. The said Exhibits carried the notice "America's Famous Fashion Family."

In addition to this portion, namely, SACHS, being common to both of appellant's trademarks, there is the admitted penchant of the American public for abbreviating names and for resorting to the last name in two-name trademarks, a characteristic which is aptly noted in **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra:

“In considering a case like this, we must take into consideration the habits of the American buying public. Just as Americans are prone to abbreviate names, and Young Men's Christian Association became, first the Y. M. C. A., and later—especially among the soldiers—the Y, so do they abbreviate longer business names. And Sears, Roebuck & Co. becomes Sears, J. W. Robinson Co. becomes Robinson's, R. H. Macy & Co. becomes Macy's, John Wanamaker becomes Wanamaker's, Tiffany & Co. becomes Tiffany's, and John B. Stetson becomes Stetson's. More, if a person has achieved successful manufacturing or merchandising in a particular field, the average American, who constitutes our buying public, will identify the name with the product. So Tiffany spells jewelry, Waterman, fountain pens, Ford and Chrysler, automobiles, Hoover, cleaners, Waltham and Elgin, watches, Standard, oil products, Stetson, hats.”

Callmann, in **Unfair Competition and Trademarks**, supra, also most lucidly expressed the same thought:

“An individual's first name is even less effective than his family name to create distinction or prevent deception. This is true not only when the family name is as well-sounding as ‘Portuendo,’ or as famous as ‘Coty,’ ‘Stetson,’ ‘Rademaker,’ or ‘Baker,’ but in all cases where two compete under the same family name. This is even stronger with respect to the use of initials as a distinguishing feature” (pages 1488-1489).

Accordingly, the reasonable conclusion is that appellant's trademarks are, in truth, PAUL SACHS and DON SACHS,

since such distinguish appellant's dresses, the word "Original" having no significance and being wholly descriptive as used in conjunction with dresses; and, further, that the word "SACHS" is decidedly the dominant portion of appellant's marks. Dominance is thus not determined altogether by the manner of presentation, but rather in light of common customs and practices. Interestingly enough, in the **Wohl Shoe Co. v. Elder** case, supra, the dominantly presented word in the applicant's mark, namely, "ANOTHER", was deemed to have no trademark significance.

At this juncture note should be made of certain statements in the Memorandum of Decision which might suggest that the District Court felt that the word "SACHS" could not be the dominant portion. After noting appellant's argument that "Original" could have no trademark significance, the District Court stated:

"This bolstered plaintiff's argument that 'Sachs' was the dominant feature of the mark. In passing, it should be noted that this is a surname such as would not alone be accepted for registration."

It would thus seem that the District Court considered "SACHS" as being unregistrable and, ergo, without trademark significance. It is believed that the District Court observed only Section 1052 (e) (3) of Title 15, United States Code, which states that a name which is "primarily merely a surname" is not registrable, and failed to note the provisions of 15 U. S. C. 1052 (f), which provides that nothing in Section 1052 (e) will prevent registration of a mark which has become distinctive of the applicant's goods in commerce. Thus, surnames which have become distinctive of a party's goods are registrable in the United States Patent Office. An interesting facet of this situation is that appellant's Registration No. 502,925, Exhibit 1, was granted under the provisions of the aforesaid 15 U. S. C., Section 1052 (f), when the Patent Office, in the early days of the effectiveness of the

present Trade Mark Act, labored under the impression that marks which comprised both a christian name and a surname were considered “primarily merely a surname.” Therefore, if the District Court meant by its statements to suggest that appellant needed the word “Original” to add trademark significance to the name “Sachs,” such was erroneous and contrary to facts and law.

### C. Appellees' Trademark.

#### 1. “SACHS” Dominant Portion of Appellees' Trademark.

From a study of the Memorandum of Decision one would assume that in the appellees' trademark the expression “of California” was given an emphasis equal to that given the name “SACHS.” The manner of presenting this phrase in the Memorandum, as well as the omission of any discussion concerning the presentation of same (as contradistinguished from the discussion of the manner of presenting appellant's marks) would conduce to this viewpoint. However, such is not valid, since the appellees have unfailingly presented the word “SACHS” in what might be considered overpowering relation to the expression “of California.” Reference is made to the appellees' label and hang tag, Exhibits A and B, as well as Exhibits C, D, E, F, G, H, and K, constituting order forms, post cards, calling cards, and advertisements, which show the arresting predominance of the word “SACHS.” It will thus be seen that the term “of California” is presented in a wholly subordinate manner to the word “SACHS” and is so subordinated as to be in some instances almost illegible. The letters in the word “SACHS” are at least five times the size of the letters in the phrase “of California,” with the letters “S” and “H” being substantially between seven and eight times the size of the letters in the said geographical phrase. From the standpoint of manner of presentation, it is evident that appellees ascribed dominance to the

name SACHS and subjectively placed their reliance on said word to identify their merchandise. In Appellees' Exhibit J it may be noted that the name SACHS is presented on the topmost line without accompaniment by the expression "of California." Pertinent is the following statement in Callmann, **Unfair Competition and Trademarks**, supra, at page 1438:

"The dominant feature of a trademark would seem to be that which is most noticeable and most unavoidably attracts the attention of the public."

If appellees intended, regardless of how mistakenly, for the expression "of California" to distinguish their dresses, they would certainly have presented the phrase in a predominant manner.

For reasons to be discussed at length hereinbelow, the expression "of California" is inherently incapable of distinguishing appellees' dresses and thus could not in any circumstance be considered the dominant portion of their mark regardless of the manner of presentation. However, the very manner of usage by appellees in and of itself underscores the actual and the intended dominance of the word "SACHS."

## 2. The words "of California" without trademark significance.

It is appellant's contention that appellees' trademark is, to all intents and purposes, the word "SACHS," and that the expression "of California" is adjectival. With regard to this phrase the District Court made various findings, stating that "the term 'Sachs of California' is in part **descriptive** of the geographical origin and place of manufacture of all the goods manufactured by defendants" (R 38). Further on in the Memorandum of Decision the District Court stated:

"\* \* \* The words 'of California' attached to a dress label have acquired special value \* \* \*. The use of

the words 'of California' constitutes an added value and is a 'plus factor' in selling merchandise. Defendants adopted the term 'of California' to establish the **origin and place of manufacture of their goods** and to take full advantage of, and benefit from, the widespread national advertising and promotion of California-made goods" (R 41) (Emphasis ours).

Further on the District Court stated as follows:

"Defendants attached great significance to the words 'of California' as **indicating place of origin** and as a customer attraction. The evidence indicates that goods originating in California have a special acceptance among retail and wholesale buyers in women's ready-to-wear apparel from whatever the cause may be" (R 48) (Emphasis ours).

The District Court thus ambivalently held that the expression "of California" had both a primary and secondary meaning, being able to serve two distinct functions simultaneously. However, the term must be considered as either descriptive or otherwise; it certainly cannot be both.

To the extent that the District Court found the expression to be descriptive the appellant concurs, so that, in view of the precedents above cited, namely, **American Brewing Company, Inc. v. Delatour Beverage Corporation**, supra; **Hygienic Products Co. v. Huntington Laboratories, Inc.**, supra; **Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.**, supra, the said descriptive phrase can have no trademark significance. The lack of distinctiveness of this phrase is well expressed in Callmann, **Unfair Competition and Trademarks**, supra, at page 1492:

"The addition of the business place of the trademark owner to the mark is not distinctive enough to obviate confusing similarity between the marks."

Noteworthy in this regard is **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra, wherein the defendants added the expression "of California" to their trade name,

but such was insufficient to prevent a holding of confusing similarity. Notice might also be taken of the holding of the Commissioner of Patents in **Ex parte Buddy Kit Co.** (1948), 77 USPQ 234. Therein, the trademark “Riviera of California,” with the expression “of California” being disclaimed, as used on certain articles of men’s wearing apparel, was held confusingly similar to the trademark “Riviera” as used on various items of men’s and boys’ wear. The applicant expectedly argued that its mark was distinguishable because of the addition of the words “of California” and “\* \* \* that ‘California sportswear’ constitutes a type of garment now well recognized and which accordingly cannot be confused with ordinary clothing.” In rejecting this contention the Commissioner stated:

“While the mark must be considered as a whole, and descriptive or disclaimed features may not always be wholly disregarded, the disclaimed words ‘of California’ as used in this application **add nothing to the mark and cannot be considered to have any distinctive significance.** Nor can an applicant obtain right to registration of the mark of another by merely adding a descriptive or geographic term to it” (Emphasis ours).

Also pertinent in this regard is the case of **Richard Hudnut v. Du Barry of Hollywood, Inc.**, supra, wherein defendant’s use of the expression “Du Barry of Hollywood” was considered confusingly similar to plaintiff’s trademark “Du Barry.” The court stated:

“The words ‘of Hollywood’ in defendant’s corporate title do not serve to distinguish defendant from plaintiff; on the contrary, the use of this corporate suffix in conjunction with the plaintiff’s trademark and trade name Du Barry, has the effect of falsely representing that the defendant is the plaintiff or its Hollywood branch.”

Also germane is **Celeste Frocks, Inc. v. Celeste of Miami, Inc.** (D. C. S. C. Fla.—1957), 150 F. Supp. 604, 114 USPQ

61, wherein the addition of the expression “of Miami” was insufficient to avoid the likelihood of confusion between the names of the parties. Quite recent is the holding in the case of **American Kennel Club v. American Kennel Club of La.** (D. C. E. D. La.—1963), 216 F. Supp. 267, 137 USPQ 852, wherein the adoption and use of the phrase “of La.” was held inadequate to avoid a holding of confusing similarity between the names of the parties. In **Frankfort Distilleries, Inc. v. Kasko Distillers Products Corp.** (CCPA—1940), 111 F. 2d 481, 45 USPQ 438, the trademark of applicant, “Maryland Rose,” as applied to whiskey was deemed confusingly similar to the registrant’s mark “Four Roses” as used on the same merchandise. The court stated:

“It is clear to us that the word ‘Rose’ is the dominant part of the appellee’s mark, the word ‘Maryland’ not in any way indicating to purchasers the origin of the goods in the distiller, **but only the State in which the goods are produced.**”

In **Chester Barrie, Ltd. v. Chester Laurie, Ltd.**, supra, the defendant had registered the trademark “Chester Laurie of Hollywood” (with the words “of Hollywood” disclaimed), but such was held to be confusingly similar to plaintiff’s trademark “Chester Barrie.”

Thus, the precedents uniformly have held, and do continue to hold, that the mere addition to a trademark of the geographic place of manufacture of the goods in question does not serve to avoid confusing similarity. Such geographic phrases are descriptive and thus are without trademark significance. The District Court clearly did recognize the descriptive nature of the expression “of California” and in view thereof should not have considered same as a distinguishing feature of appellees’ trademark.

The viewpoint herein expressed is also concurred in by appellees, since the following admission appears in their



answer to appellant's complaint under the heading "Third Separate Defense." The appellees stated "that the term 'Sachs of California'" is descriptive of the geographical origin and place of manufacture of appellees' goods (R 28).

In considering the other aspect of the Court's finding to the effect that the expression "of California" has some special value or "plus factor" as used in trademarks, it is submitted that such a finding is not supported by the evidence. Appellees' witness Mr. Woodard testified that some 260 out of a possible 760 garment manufacturers in the State of California are members of an organization known as California Fashion Creators (RTR 367), and that most of the 260 utilize the expression "California" or "of California" in their trademarks. According to the testimony, the only requirements for joining the organization are ability to pay the dues and meet any assessments (RTR 364). There was no evidence that the members of the organization had to produce garments of a certain style, calibre of workmanship, colors, etc., there being thus no precise standards, so that, evidently, the organization's sole purpose is to promote the sale of the members' garments, as by advertising. Since all of the members are located in the State of California, then they, as well as other California firms who are non-members, would certainly have the right to use the name of the geographical place of origin of their goods. There is certainly nothing distinctive about such an expression when used by hundreds of diverse firms. Mr. Woodard testified that the use of "California" or "of California" was a "plus factor" in selling the members' merchandise (RTR 368). This is nothing more than a self-serving statement uttered by the president of the said organization, who could only be expected to so testify. To establish this so-called "plus factor", appellees would be expected to present purchasers from other parts of the country, rather than merely the understandably partisan statement of a Cali-

ifornia manufacturer. Secondary meaning, which at best is most difficult to establish, can only be proved by the reaction of customers and the general acceptance of a term in the market place. Appellees presented only Californians, and, with understandable pride in their home State, they could not be expected to have testified other than as Mr. Woodard testified. However, as will be shown hereinbelow, even Californians could not unequivocally testify in a manner corroborative of Mr. Woodard.

In this connection the implication of the District Court's finding should be carefully noted, for it indicates that the mere addition of the words "of California" to a trademark will in some way endow the merchandise with an added quality. There was no proof that the expression "California" or "of California" related to any particular garment qualities which were unique to garments made in the State of California; hence, the appellees did not use the expression "of California" to signify or refer to any properties of their dresses which would distinguish the same from dresses manufactured in any other part of the United States. Without some unique distinctiveness in the goods, there is no basis for considering the expression "of California" as more than a designation of a place of manufacture.

This view is substantiated by testimony of various of appellees' witnesses. Please note the following:

"Q. Can you tell by looking at the garment whether it was manufactured in California or elsewhere?

A. [Appellees' witness Miss Jefferson] Not exactly. They have certain characteristics, of course, of the brighter colors. You don't have so much in bright colors coming from the East as you do here. But, of course, you couldn't tell exactly" (RTR 281).

\* \* \* \* \*

"Q. [By Mr. Kalish] Now these firms you mentioned, I think you gave New York City addresses.

A. Yes.

Q. Now, are they capable of producing garments with the proper colors to attract the average Californian?

A. I would say so.

The Court: Well, do they? The question of whether or not they are capable is one thing.

The Witness: They do.

The Court: All right.

The Witness: I wouldn't be buying from them if the merchandise wasn't selling.

The Court: All right.

Q. [By Mr. Kalish] Would you say that the garments produced by Stanhope and Joan Lee, Victoria [New York firms], etc., have color shades or color hues which are comparable to the color shades and color hues of Sachs of California dresses?

A. I would say so (RTR 473).

\* \* \* \* \*

The Court: Is there such a thing as a California style which is recognizable as such in this line of dresses?

The Witness [Appellees' witness Weishar]: I don't think so. I mean styles change from week to week, month to month. I don't think I understand.

The Court: Is there anything characteristic in dresses manufactured by California manufacturers which distinguishes them generally—

The Witness: The one type, yes,—

The Court: —from eastern manufacturers?

The Witness: Well, the one type would be, this time of year would be the tank top, the spaghetti dress, which is not a predominant styling of the East. It is done in Florida and it is done out here, and in Texas, and in your hot areas, of course, is where it is made.

The Court: Are there other features at other times of the year that would be similar?

The Witness: To the East?

The Court: No. That would be similar to what you have described here as distinctive.

The Witness: No, I don't think so" (RTR 474).

The testimony of appellees' witness Irving Singer would seem to coincide with that of Mr. Schechter in stating:

"Our story, as I say, is color out here. In my estimation, what we have to sell is **primarily** color" (RTR 330). (Emphasis ours.)

Yet, as shown by the testimony of appellees' witness Weishar, the so-called "hot colors" are also used in the East:

"\* \* \* It [the use of hot colors] has been accepted all over the country. It is not where it is limited only out here" (RTR 475).

And both appellees' witnesses Weishar and Schechter forthrightly testified that the East had picked up the California color trend at least four years ago (RTR 476, 494), which was prior to the inception of appellees' firm in 1960.

Plaintiff's expert witness Eddie Silk fully corroborated the testimony of appellees' witnesses, as observe the following:

"Q. [By Mr. Kalish]: Mr. Silk, is there such a thing in the wearing apparel—I should say ladies' dress field known as the California style?

A. Well, that is an ambiguous question. I am afraid I can't answer that.

The Court: The question isn't ambiguous.

The Witness: The answer would have to be no, there is no such thing.

The Court: All right, that is the answer.

Q. [By Mr. Kalish]: As the California style?

A. No, sir.

Q. Would you be able, based upon your experience in the women's and misses dress field, to look at a dress without a trademark or label attached to it and determine whether it had been manufactured in California or elsewhere?

A. No, sir, I could not. I couldn't tell whether it was in Los Angeles, New York, Chicago, or where it was manufactured.

Q. There would be no means for such a determination based upon styling?

A. Not unless there is a label.

Q. Without a label?

A. A misses dress made in Los Angeles and a misses dress made in New York put side by side, I don't think that any buyer could tell the difference—I mean tell the city of origin, unless they picked different types of clothes completely. Anybody can be fooled. They could pick a heavy wool suit out of New York and a nice print dress out of California and ask you which was made where and your guessing would pick the print. If they picked a pretty print dress from New York and a pretty print dress from California and put them side by side, nobody could tell you where that dress is manufactured.

Q. Do you know whether or not women's dresses of the so-called leisure wear or casual wear type are produced outside the State of California?

A. They are produced all over the United States.

Q. Are there any particular colors, shades, or the like, in women's dresses which are particularly associated with the State of California?

A. Only higher shades are associated with California, but these same higher shades are made by Eastern lines to be sold all over the country at the same time" (RTR 112-114).

The foregoing testimony establishes that the expression "of California" has, in fact, no special meaning in the

dress field, since the same types of dresses that are produced in California are produced in other areas in the United States and have been so since at least before appellees started their business. Therefore, it is submitted that the record does not support a finding that the expression “of California” is to be accorded some special value when used in the women’s wearing apparel field.

A mere cursory examination of the firms listed in various exhibits of both parties, such as Appellant’s Exhibits 69, 93 and 94, and Appellees’ Exhibits P, Q, Y, Z, AA, BB, and CC (RTR 103), discloses that the use of the expression “of California” is so widely utilized that it is inherently incapable of the distinctiveness which the District Court would find therein. As a matter of fact, appellees’ Exhibit Q alone is most revealing in this regard. (As an aside, the same Exhibit shows at least eight firms, of the relatively small number, set forth, using the word “originals”). Additionally, note should be taken of the fact that appellee, John Sachs, was personally well acquainted with the use of the term “of California”, since he worked as a salesman for the firm known as Sun Maid of California (RTR 503) and was a partner in the firm of Steffi of California (RTR 506) prior to associating with appellees.

It must be remembered that appellees did not place in evidence any proof that they were manufacturing their garments, or styling same, in any particular manner at all, but were merely relying upon the fact that they had used the term “of California” in both their trademark and trade name, and by such addition to the name “Sachs”, without more, assumed that their garments were entitled to a “plus factor”. Certainly, the implications of this assumption, together with the District Court’s holding in support thereof, is manifest, for if carried to its logical extreme, it indicates that almost any trademark which had been in use for years could be adopted by a

California concern and rendered proof against successful attack by merely adding the words “of California” thereto.

#### IV.

#### NOTICE OF APPELLANT'S TRADEMARKS.

In its Memorandum of Decision the trial court stated that “Although defendants may be charged with constructive notice of [appellant's] registered trademarks Nos. 502,925 and 708,120, they had no actual knowledge of their existence or use” (R 39). The District Court did note that appellees had made no search in the United States Patent Office to determine whether or not their trademark was confusingly similar to any registered mark. The District Court then went on to state that “The first notice **of any nature**” received by appellees as to appellant's trademarks was by a writing dated June 7, 1961 (R 41) (emphasis ours), slightly more than eight months after appellees had registered their Articles of Partnership, September 26, 1960.

The Trade Mark Act of 1946 provides as follows:

“Registration of a mark on the Principal Register provided by this Act \* \* \* shall be constructive notice of the registrant's claim of ownership thereof” (15 U. S. C. 1072).

Despite the specific language of this statute the trial court ignored the import thereof and relied improperly only upon the concept of real or actual notice. In so doing, the District Court denied appellant of one of the primary benefits provided by said Act. This Court stated, in a case decided a little over a month ago, **Pacific Supply Cooperative v. Farmers Exchange** (CAA 9—1963), Docket No. 17967, 137 USPQ 835:

“For the first time registration of a mark gave **constructive notice to the world** of the registrant's claim of ownership (15 U. S. C., Sec. 1072), including those previously relying on intrastate use only.”

In **Quality Courts United, Inc. v. Quality Courts, Inc.** (D. C. M. D. Pa.—1956), 140 F. Supp. 341, 109 USPQ 92, the court stated:

“The greatest single advantage of a principal registration is that it is constructive notice of the registrant’s claim of ownership of the mark \* \* \*. Subsequent use of the mark by another \* \* \* is an unlawful use and cannot be justified by a claim of innocence, good faith or lack of knowledge.”

In **General Electric Co. v. Schwartz** (D. C. E. D. N. Y.—1951), 99 F. Supp. 365, 90 USPQ 198, the court stated:

“The principal benefits gained by valid registration are of course the constructive notice to infringers (15 U. S. C. A. 1072) and the presumption of validity.”

Also pertinent is the case of **Dawn Donut Co., Inc. v. Harts Food Stores, Inc.** (CCA 2—1959), 267 F. 2d 358, 121 USPQ 430, wherein the court made the following statement:

“But the Lanham Act, 15 U. S. C. 1072, provides that registration of a trademark on the principal register is constructive notice of the registrant’s claim of ownership. Thus, by eliminating the defense of good faith and lack of knowledge, 1072 affords nationwide protection to registered marks, regardless of the areas in which the registrant actually uses the mark.”

The appellant’s application for the registration of its trademark DON SACHS was published in the Official Gazette of the Patent Office of September 20, 1960, Exhibit 70 (RTR 251), which was prior to the filing of the Articles of Partnership of appellees; and in accordance with a relatively recent case appellees are presumed to have had constructive notice of appellant’s said mark as of the date of publication. In **American Petrofina, Incorporated v. Mauro** (D. C. W. D. N. Y.—1960), 185 F.



Supp. 171, 125 USPQ 643, constructive notice under the aforesaid Act was interpreted as being effective as of the date of publication in the Official Gazette of the United States Patent Office of a party's application for purposes of opposition.

Accordingly, appellant is entitled to the full benefit of the said statute and, therefore, appellees must be presumed to have had notice prior to commencing their operations.

Despite the benefit of constructive notice under the said Act, the proofs adduced at the trial would circumstantially establish that at least appellee John Sachs had actual notice of appellant's trademarks long before he considered forming appellee partnership. It must be remembered that appellant had been conducting its business in the State of California for many years, and particularly in the City of Los Angeles, the situs of appellees' partnership, long before appellees established their business. Appellant had exhibited its dresses at the same "markets" as were utilized by the firms for which appellee John Sachs was a salesman for the ten to twelve-year period prior to inception of appellees firm, such as, particularly, the Pacific Coast Travelers Association "markets" held at the Biltmore Hotel in Los Angeles. In addition, the advertisements of appellant in Vogue magazine, Exhibits 25 to 30, inclusive (RTR 233), must, in all likelihood, have been seen by either Mr. or Mrs. Sachs of appellees' firm, or both, as well as possibly some or all of appellant's customers ads in California newspapers, Exhibits 49, and 52 to 63, inclusive (RTR 99). Accordingly, it is difficult to believe that there was not actual notice, in truth, at a date long prior to the inception of appellees' business.

It is therefore submitted that the District Court failed to find as a fact that appellees did have notice of appellant's trademarks before beginning their operation.

In connection with the matter of notice, the District Court found that at the time appellees had received appellant's notice dated June 7, 1961, the firm had become "well established and their products and trade name well known to the trade both within and without the State of California." Appellant most respectfully submits that there is **not the faintest scintilla of evidence** in the record which could in any way be construed as supporting such a finding. Appellees studiously avoided producing any evidence whatever as to volume of sales, either in dollars or units, for any period of time between the date of inception of the firm and the date of the trial. Nor did appellees give proof as to the expenditure for advertising its dresses under its trademark and trade name for any segment of time within the said period. Accordingly, such finding of the District Court is contrary to the evidence. Furthermore, certainly a court will take judicial notice of the fact that a substantially one-man business (since appellee Leo Hirsch was admittedly not active in the business) could scarcely, during the eight and a half month period between September 26, 1960 and June 7, 1961, and in such a fiercely competitive field as the dress industry, have effected such an operation as to cause its firm to be considered well established and its trade name well known. The record is barren of any proof which could provide a basis for the court's finding. This is not a question of weight of evidence, as there was a total absence of evidence. In improperly giving so much unfounded significance to the initial eight and a half month operation of appellees, whatever it might, in fact, have been, the District Court appeared to fail to consider with like mind the import of its findings as to the twenty-year operation of appellant in the same field, on a national scale, and with a sales volume **exceeding \$1,500,000 annually** for the period and an expenditure of \$400,000 for advertising (R 33).

V.

NOT REQUISITE TO SHOW ACTUAL CONFUSION.

The District Court, in its Memorandum, stated:

“There was no evidence of actual confusion of goods. While this is not a prerequisite for relief it has been characterized as constituting the strongest evidence” (R 49).

The statement of the District Court indicates that it was persuaded that actual confusion must, in fact, be shown. The District Court gave no legal precedent for its viewpoint. The necessity of establishing actual confusion in cases of this type is contrary to common law unfair competition and to the Trade Mark Act of 1946. The authorities on this point are myriad. Note the following:

“California follows the ‘likelihood of confusion’ test and does not require actual proof of confusion on the part of consumers.” **Audio Fidelity, Inc., v. High Fidelity Recordings, Inc.**, supra.

Also see the recent case of **Drexel Enterprises, Inc., v. Colby**, supra:

“And the law does not require that there be actual diversion of trade. It is sufficient that the imitation be of a character which is likely to have that result.” **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra.

“\* \* \* although actual confusion is not essential in the proof of infringing a trademark.” **Mershon Co. v. Pachmayr**, supra.

In the case of **MacSweeney Enterprises v. Tarantino** (1951), 106 Cal. App. 2d 504, 235 P. 2d 266, the court stated:

“Proof of actual confusion is not necessary. If the facts support the conclusion that a purchaser of ordinary intelligence could reasonably be confused, that is all that is required.”

In **Winfield v. Charles** (1946), 77 Cal. App. 2d 64, 175 P. 2d 69, the court stated:

“It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the likelihood of deception which the remedy may be invoked to prevent. \* \* \* The universal question is whether the public is likely to be deceived.”

See also **Lorraine Mfg. Co., Inc. v. Loraine Knitwear Co., Inc.** (D. C. N. D. Ga.—1949), 88 F. Supp. 634, 84 USPQ 71, wherein, despite the fact that plaintiff had not shown an instance of any purchaser being actually misled plaintiff prevailed. In **Swarthmore Classics, Inc. v. Swarthmore Junior**, *supra*, the court stated:

“I have found that while there is no proof that any member of the public has been misled into the belief that plaintiff’s blouses originate at the same source as defendants’ dresses, it is probable that such a false belief will be generated. Evidence of specific instances of confusion is unnecessary; *LaTouraine Coffee Co. v. Lorraine Coffee Co.*, C. C. A. 2, 1946, 157 F. 2d 115 (70 USPQ 429).”

Most apt is the following statement by the court in **Kay Dunhill, Inc. v. Dunhill Fabrics, Inc.**, *supra*:

“\* \* \* it was long ago held that the essence of wrong in trade mark cases ‘consists in the sale of the goods of one manufacturer or vendor for those of another.’ **Moreover, it is not necessary to establish by proof particular instances of such sales.** The misleading nature of defendant’s name or of the contents of hang tags attached to or of advertisements of dresses manufactured from defendant’s fabrics and the uncertainty arising therefrom constitute enough to be characterized as a prohibited invasion of the prior and superior exclusive right acquired by plaintiff to the trade name previous to defendant coming into the field as it did.” (Emphasis ours.)

The pertinent portion of the Trade Mark Act of 1946, 15 U. S. C., Sec. 1114 (1), is set forth hereinabove (page 12). The following cases are merely exemplary of the judicial interpretation of said statute:

“\* \* \* it is not necessary to show actual cases of confusion since the test under the statute, 15 U. S. C. A., Sec. 1114 (1) is likelihood of confusion.” **G. D. Searle & Co. v. Chas. Pfizter & Co., Inc.** (CA 7—1959), 265 F. 2d 385, 121 USPQ 74.

“In the instant case, there is no evidence that any purchaser was, in fact, confused or misled by the defendant’s use of the name ‘POL-PAK.’ **However, it was not necessary for the plaintiff to prove actual confusion.** The statutory test is likelihood of confusion. 15 U. S. C. A. 1114 (1) (a); *Keller Products v. Rubber Linings Corp.*, 213 F. 2d 382, 101 USPQ 307 (7th Cir. 1954); *Independent Nail & Pac. Co. v. Stronghold Screw Prod.*, supra.” **Pikle-Rite Co., Inc., v. Chicago Pickle Co., Inc.**, supra. (Emphasis ours.)

Appellant’s case is not to be considered any the less strong because instances of actual confusion were not shown. It must be remembered that appellant, in sending its notice of infringement dated June 7, 1961, acted promptly—scarcely eight months after the appellees’ beginnings—to prevent the incidence of actual confusion, and that by the time this case had reached trial there had been hardly twenty months of co-existence of the parties. Since appellees did not indicate or even remotely suggest their volume of sales, there cannot be any possible inference that the operations of appellees were on such a scale during the very short period of time involved to allow the development of actual confusion to any reasonable extent.

Appellees set forth as their so-called representative accounts various firms. However, it was certainly within appellees’ power to present concrete evidence as to the

extent of their sales to each of these firms; and since appellees did not see fit to produce such evidence, one may logically assume that if such had been adduced it would not have been favorable to appellees' position. Therefore, it is fair to presume that the extent of sales to these accounts was minimal in character, being possibly nothing more than a sample order.

“It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion. ‘It is certainly a maxim,’ said Lord Mansfield, ‘that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.’” *Fischer v. Insurance Company* (1911), 124 Tenn. 450. (Emphasis ours.)

In order that there be created a presumption that actual confusion was unlikely, appellees would certainly have had to show that their volume was of such an extent and distribution so widespread that a definite, continuing opportunity had been provided for the development of confusion. This they did not do. The law provides only for the establishment of the **likelihood of confusion** since, if the parties had to wait until such time as their respective operations allowed for actual confusion, both would necessarily suffer grievously. Consequently, appellant's providing actual notice with alacrity and following same promptly with this suit showed its concern for its property rights and its intent to prevent and avoid the development of actual confusion. Thus the test both at common law and by statute is the **likelihood of confusion**, not

actual confusion. If the law were to be interpreted in the manner of the District Court, then only proof of actual confusion could support a finding of **likelihood of confusion**.

Additionally, it will be noted that the District Court used the expression "actual confusion of goods." It is submitted that the District Court applied an erroneous standard, since the true issue is not whether there is a confusion of goods, but whether there is a confusion as to the source of origin of the goods.

## VI.

### THE EFFECT OF APPELLANT'S REGISTRATIONS.

Appellant's Registration No. 502,925 for the trademark PAUL SACHS Original, Exhibit 1, became incontestable upon the filing of the affidavit required under Section 15 of the Trade Mark Act of 1946 (15 U. S. C. 1065). By virtue of the provisions of the said Act, appellant is accorded a conclusive presumption of its exclusive right to use the said trademark upon the merchandise specified, namely, women's and misses' wearing apparel, including dresses and suits. In the case of **Richard Hudnut v. Du Barry of Hollywood, Inc.**, supra, the court held that by virtue of the incontestability of the plaintiff's registration therein, plaintiff was accorded the right to use its mark "upon such other goods as **might naturally be supposed to come from the plaintiff**" (emphasis ours). Appellant submits that the appellees' dresses constitute such goods as might be expected to come from appellant. By reason of its incontestability, the aforesaid registration is not subject to attack upon the ground that the trademark is not a technical trademark, and it therefore is to be accorded maximum benefit of the said Act.

Appellant's registrations for the trademark DON SACHS, No. 708,120, Exhibit 2, although not yet entitled to the attribute of incontestability since it has not been

used for five years subsequent to registration, is entitled to definite, strong presumption of validity. In this regard, the present Trade Mark Act has clearly exceeded prior Acts. The pertinent section of this Act, 15 U. S. C. 1057b, provides:

“A certificate of registration of a mark upon the principal register provided by this Act shall be prima facie evidence of the validity of the registration, registrant’s ownership of the mark, and of registrant’s exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein.”

Each of the appellant’s trademarks is fanciful, and such fact is stated in Registration No. 502,925, Exhibit 1. The record demonstrates that no individuals by the names of Paul Sachs or Don Sachs have ever been associated with appellant (RTR 221), so that both of appellant’s marks are fanciful and arbitrary. In **Chester Barrie, Ltd. v. Chester Laurie, Ltd.**, supra, the court held that the plaintiff’s registered trademark “Chester Barrie” was fanciful and arbitrary; “as such it is a strong mark.” A similar holding was made by this court in the case of **Richard Hudnut v. Du Barry of Hollywood, Inc.**, supra, wherein it was stated that the registered trademark “Du Barry” was a strong trademark and valid at common law.

Thus, the courts have clearly recognized that trademarks of similar character to those of appellant are strong technical trademarks. It is submitted that this fact, and all implications thereof, were overlooked by the District Court, who, in comparing the marks of the parties, indicated its doubts as to the validity of appellant’s marks and the protection to which they are entitled by the statement: “If plaintiff’s marks have an established secondary meaning, \* \* \*” (R 50). Since appellant’s trademarks are registered on the Principal Register, there can cer-



tainly be no question as to the same having secondary meaning. The doctrine of secondary meaning attaches to unregistered or common-law trademarks, and more particularly to trademarks which consist of words having a primary lexical meaning. The District Court's statement, in addition to apparently disregarding the rights provided appellant's trademarks by their registrations, also suggests that the District Court did not take into consideration the long, widespread usage of appellant's trademarks prior to appellees' inception. By the date of the trial, appellant had used its trademark PAUL SACHS Original for twenty consecutive years, whereas its trademark DON SACHS had been used for about three years. Despite appellant's high volume, national usage during these periods, the District Court seems, by the said remark, to question whether appellant's marks developed any rights in that time (despite registration). On the other hand, the District Court, without evidence, found that the appellees, during the period September 26, 1960 through June 7, 1961 (less than eight and a half months), had caused their trademark and trade name to be "well established" and their products "well known to the trade both within and without the State of California" (R 41). There is nothing in the record to warrant an attack upon either of appellant's registrations; therefore, the District Court's aforesaid statement of doubt concerning the character of appellant's trademarks is unsupported and further demonstrates the overlooking of the benefit and import of registration.

## VII.

### LIKELIHOOD OF CONFUSION ESTABLISHED.

As established by the record, and as discussed hereinabove, two cardinal facts stand out in relief:

**One:** The dresses of the parties are substantially identical merchandise, but in any event, are capable of emanating from the same source of origin.

**Two:** The dominant portion, namely, SACHS, of each of the trademarks of the parties is identical. In view of these facts, concurrent use of the respective marks of the parties upon their dresses could only be likely to cause confusion or mistake or deception among purchasers as to source of origin of the goods.

In cases of this type the problem is not one of confusing store buyers, since they know the source from which they are buying merchandise for resale and expectedly exercise selectivity when making purchases for the purpose of enhancing the profits of their particular organizations. The testimony of appellant's witness Eddie Silk brought out that store buyers and salesmen for dress manufacturers become good friends through their constant contacts (RTR 78-79), which friendships allow for initial sales from the salesmen when they work for other concerns. Thus, obviously Mr. John Sachs of appellees' firm, through his many years as a salesman for Sun Maid of California; Lou-Ette Originals, and Steffi of California developed friends among store buyers, who no doubt were inclined to purchase from him when appellees' firm was started. Such purchases, however, are obviously without reference to any particular trademark but are based upon a personal acquaintanceship between the store buyer and the salesman. In the case of **Lorraine Mfg. Co., Inc. v. Lorraine Knitwear Co., Inc.**, supra, the court noted that the store buyers for the parties' goods, because of their positions as buyers, could not be misled as to the source of goods. But this recognition justifiably did not interfere with the court's holding that plaintiff's trademark "Lorraine" on textile fabrics used in the manufacture of articles of clothing, was infringed by "Lorraine" as used on sweaters, swim wear, jackets, sports shirts, tee shirts. **Therefore, it is a question as to confusion of the ultimate consumer as to the source of origin of the dresses.** It is the consumer who must be protected. In its Memorandum of Decision the District Court found that the difference in

goods manufactured and sold by the respective parties was recognizable by “the customers and prospective customers of the respective parties” (R 48). As the record shows, the parties sell to department stores and specialty shops, so that any lack of confusion on the part of such establishments is not properly involved in this case. The District Court in referring to a division between “lines” of dresses, stated that the apparent overlapping was recognized in industry. “If this signal is not recognized by the woman retail customer, it is recognized by **the store buyers**” (R 33) (emphasis ours). It is submitted that the District Court was improperly influenced by lack of confusion on the wholesale or industrial level, and such is of no moment in cases of this type.

In the present case, the Court is not presented with a so-called “double difference” situation, wherein there is a distinction in the goods and a distinction in the marks, nor with but a single difference in either the goods or the marks, but is faced with a situation wherein the parties produce substantially identical merchandise which is sold in the same channels of trade under trademarks having identical dominant portions. Pertinent is the case of **Brooks Bros. v. Brooks Clothing of California, Ltd.**, supra, wherein both parties dealt in men’s clothing and wherein the dominant portion of the trademarks was identical, as each contained the word “Brooks.” Interestingly enough, in that case defendant sought to distinguish its goods on the ground of lower price, etc., but the court countered by stating, “Clothes is clothes.” Defendant also sought to distinguish its trade name on the ground that the same incorporated the expression “of California.” Yet plaintiff prevailed. In **Lane Bryant, Inc. v. Maternity Lane, Ltd.** (CCA 9—1949), 173 F. 2d 559, 81 USPQ 1, the goods of the parties were maternity garments and their trademarks and trade names incorporated the word “Lane.” Incidentally, the corporate name of defendant was “Maternity Lane, Ltd. of California.” Therein, this Court reversed the Dis-

trict Court's judgment dismissing the complaint. Another case wherein the merchandise was substantially the same and the trademarks incorporated the same dominant portions is: **Chester Barrie, Ltd. v. Chester Laurie, Ltd.**, supra, wherein the merchandise of the parties consisted of articles of wearing apparel and the trademarks and trade names were Chester Barrie and Chester Laurie. Therein the defendant was utilizing the expression "Chester Laurie of Hollywood" as well, but in holding for the plaintiff the court most aptly stated:

"Colorable imitation of part of a valid mark of another constitutes infringement where, as here, 'the part \* \* \* taken identifies the owner's product without the rest.' *Parfumerie Roger & Gallet v. M. C. M. Co.*, 2 Cir., 1928, 24 F. 2d 698, 699; *Caron Corp. v. Ollendorff*, 2 Cir., 1947, 160 F. 2d 444, 73 USPQ 79."

In that case the court appreciated the relative weight of parts of a trademark in holding infringement and unfair competition. In **Pikle-Rite Co., Inc. v. Chicago Pickle Co., Inc.**, supra, the merchandise of the parties were the same, namely, pickles, and the dominant portions of the marks, namely "Pol-" of the respective trademark "Polka" and "Pol-Pak" were identical, resulting in the holding of infringement by the defendant. In **John B. Stetson Co. v. Stephen L. Stetson Co., Ltd.** (D. C. S. D. N. Y.—1936), 14 F. Supp. 74, 29 USPQ 586, affirmed (CCA 2—1936), 85 F. 2d 586, 30 USPQ 330, the merchandise of the parties were the same, namely, hats, and the dominant portions of both marks were the same, namely, "STETSON," so that the unfair competition and trademark infringement of defendant were made out. Also, in **Hat Corporation of America v. D. L. Davis Corp.** (D. C. Conn.—1933), 4 F. Supp. 613, 19 USPQ 210, the merchandise of the parties were the same, namely, hats, and the salient portions of the marks were the same, namely, "Dobbs," whereby the existence of unfair competition was obvious.

As discussed hereinabove, in order for a party to succeed in suits of this character it is not requisite that the goods be identical. With similar dominant portions in respective marks it is only necessary that the related merchandise be sufficiently related to suggest to the consumer a common source of origin. As this point has been fully discussed hereinabove, reference may be made to the following cases: **Kay Dunhill, Inc. v. Dunhill Fabrics, Inc.**, supra; **Swarthmore Classics, Inc. v. Swarthmore Junior**, supra; **Richard Hudnut v. Du Barry of Hollywood, Inc.**, supra; **Fancee Free Mfg. Co. v. Fancy Free Fashions, Inc.**, supra; **Barbizon Corp. v. Hollub**, supra; **Williamson-Dickie Mfg. Co. v. Davis Mfg. Co.**, supra.

There are other important facets to the matter of usage of a confusingly similar trademark by a late comer which should be carefully noted in order for a full appreciation of the damage which the prior user will sustain.

Appellant, through its long, widespread usage of its trademarks and through its advertising in national consumer publications, has developed, at considerable expense and effort, a good will in and to its trademarks of inestimable value. By the publications in which it has advertised and by the character of its advertisements appellant has consistently sought to endow its trademarks with a tone of prestige. Appellees, by use of a trademark incorporating the words "SACHS" are in a position to place in the hands of stores a tool whereby the same could trade upon the prestige advertising of appellant and capitalize upon appellant's good will. Appellant's reputation, gained at such effort, is worthy of protection. The statement of the late Judge Learned Hand in **Yale Electric Corporation v. Robertson** (CCA 2—1928), 26 F. 2d 972, is most apt:

"His [a merchant's] mark is his automatic seal. By it he vouches for the goods which bear it. It carries his name for good or ill. If another uses it,

he borrows the owner's reputation whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a registration, like a face, is the symbol of its possessor and creator, and another can use it only as a mask."

Also apt is a case decided by this Court, namely, **Del Monte Special Food Company v. California Packing Corporation**, *supra*.

Another aspect of the seriousness of this situation was brought out most vividly by the testimony of appellees' witness, Mr. Weishar, who testified as to the inherent damage in "splitting of lines."

"A. We very seldom try to split a line, because it is no good. If they see a line in my department and you can't put it into a better price range, too, the customers will start, 'Why should I pay so much more and get the same merchandise or **the same name** or same person's goods?'" (RTR 451.) (Emphasis ours.)

Mr. Weishar then went on to testify as to the problem of a particular manufacturer known to him who had had two lines of dresses, one on the inexpensive level and the other at a higher price, but to avoid confusion on the part of customers, this manufacturer was forced to adopt a different trademark for each of his lines. Note Mr. Weishar's testimony:

"Ramar of California, \$6.00 and \$8.75 is Ramar of California, and he made some \$10.00's. Usually a spread of \$6.00 to \$10.75. That one he calls Mr. Ray of California. So there you have a different label. It still is in my own department, but the customer has been accustomed to seeing Ramar and not paying more than \$15.00 for a dress. All of a sudden you will hit her with a \$20.00 dress and she will start

complaining about the workmanship or this or that and wouldn't be satisfied. So he changed his \$10.75 label to a Mr. Ray of California label'' (RTR 452).

In view of this telling testimony, the concurrent selling of dresses of appellant and appellees under their respective trademarks within the same store departments, much less within the same stores, could only cause the development of confusion with obvious damage to appellant.

It is submitted that the record in this cause unequivocally establishes the likelihood of confusion or deception or mistake among purchasers as to the source and origin of the dresses of the parties when identified by their respective trademarks. This view is in full accord with the facts and in full agreement with the law.

### **CONCLUSION.**

It is submitted that in making the various findings upon which the District Court based its decision in the Memorandum of Decision, the Court inadvertently misconceived the applicable law and was influenced by a lack of appreciation for the economic significance of the many imponderables and intangibles involved in a suit of this character. Foremost, the District Court, instead of applying the criterion of confusion as to source of origin, seemingly used confusion as to goods as the determinant. In considering the trademarks of the parties the District Court, instead of being governed by the portions of the marks which were capable of trademark significance and of thus identifying the merchandise of the parties, was influenced erroneously by the descriptive portions of the marks which were incapable of trademark significance. Additionally, as pointed out, the District Court erred in not recognizing the benefits to which appellant's trademarks were entitled by reason of their registrations and, in effect, gave no judicial recognition to the Trade Mark Act of 1946.

In view of the evidence adduced at the trial, the precedents above cited and discussed, and the arguments herewith submitted, it is earnestly contended that appellees, by their use of "SACHS of California," have infringed the registered trademarks of appellant, committed acts of unfair competition with respect to appellant's trademarks, trade name and good will, and have violated valuable property rights of appellant. Therefore, appellant, in order to protect assets which have been developed at tremendous expense and effort over a twenty-year period, is entitled to the injunctive relief prayed and to a reversal of the judgment of the District Court.

Respectfully submitted,

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## APPENDIX.

### APPELLANT'S EXHIBITS.

No.	Record Page* (RTR)
1	Certified copy of U. S. Registration No. 502,925..... ...
2	Certified copy of U. S. Registration No. 708,120..... ...
3	Appellant's cloth label for trademark PAUL SACHS Original 87, 205
4	Appellant's hang tag for trademark PAUL SACHS Original 88, 205
5	Appellant's cloth label for trademark DON SACHS Original 89, 205
6	Appellant's hang tag for trademark DON SACHS Original 89, 205
7	Advertisement, Vogue Magazine, Nov. 15, 1942..... 259
8	Advertisement, Vogue Magazine, Feb. 1, 1944.....176, 259
9	Advertisement, Vogue Magazine, June, 1945..... 259
10	Advertisement, Vogue Magazine, Aug. 15, 1948..... 259
11	Advertisement, Vogue Magazine, Feb. 1, 1949.....176, 259
12	Advertisement, Vogue Magazine, Aug. 1, 1949..... 259
13	Advertisement, Vogue Magazine, Feb. 1, 1950..... 259
14	Advertisement, Vogue Magazine, Aug. 1, 1950..... 259
15	Advertisement, Vogue Magazine, Aug. 15, 1944..... 259
16	Advertisement, Vogue Magazine, Oct. 1, 1944..... 259
17	Advertisement, Vogue Magazine, Feb. 1, 1945..... 259
18	Advertisement, Vogue Magazine, Aug. 15, 1945..... 259
19	Advertisement, Vogue Magazine, Feb. 1, 1946..... 259
20	Advertisement, Vogue Magazine, Apr. 15, 1946..... 259
21	Advertisement, Vogue Magazine, page 115, Feb. 1, 1947.... 259
22	Advertisement, Vogue Magazine, page 145, Sept. 1, 1947... 259
23	Advertisement, Vogue Magazine, page 141, Feb. 1, 1948.... 259
24	Advertisement, Vogue Magazine, page 180, May 1, 1951.... ...
25	Advertisement, Vogue Magazine, Feb. 15, 1960..... 233
26	Advertisement, Vogue Magazine, Apr. 1, 1960..... 95, 233
27	Advertisement, Vogue Magazine, May 1, 1960..... 95, 233
28	Advertisement, Vogue Magazine, June 1, 1960..... 95, 233

\* As all exhibits were received in evidence at the opening of the trial by stipulation of counsel and such were confirmed at the conclusion of the trial, the pages indicated under the column headed "Record Page" refer to the page or pages of the Record wherein the same were identified or described by witnesses.

No.		Record Page (RTR)
29	Advertisement, Vogue Magazine, Aug. 1, 1960.....	233
30	Advertisement, Vogue Magazine, Sept. 1, 1960.....	95, 233
31	Mailing piece and order card.....	95, 233
32	Advertisement, Vogue Magazine, Feb. 15, 1961.....	95, 233
33	Advertisement, Vogue Magazine, Mar. 15, 1961.....	95, 233
34	Advertisement, Vogue Magazine, Aug. 15, 1961.....	95, 233
36	Advertisement, Mademoiselle Magazine, Oct., 1947.....	215
38	Advertisement, Mademoiselle Magazine, Dec., 1947.....	215
40	Advertisement, Mademoiselle Magazine, page 38, Dec., 1948	215
41	Advertisement, Mademoiselle Magazine, Feb., 1949.....	215
42	Advertisement, Mademoiselle Magazine, Mar., 1949.....	215
43	Advertisement, Mademoiselle Magazine, Apr., 1949.....	215
44	Advertisement, Mademoiselle Magazine, Oct., 1949.....	...
47	Advertisement, Mademoiselle Magazine, Aug., 1951.....	...
48	Editorial comment, Women's Wear Daily, May 15, 1956, page 38.....	245
49	Advertisement, Charm Magazine, Mar., 1948.....	215
52	Advertisement, Glendale News-Press, Oct. 21, 1954.....	99
53	Advertisement, Glendale News-Press, Nov. 10, 1955.....	99
54	Advertisement, Glendale News-Press, Feb. 7, 1957.....	99
55	Advertisement, Glendale News-Press, July 25, 1957.....	99
56	Advertisement, Alhambra Post-Advocate, Aug. 1, 1957.....	99
57	Advertisement, Los Angeles Times, Glendale, Burbank Sec- tion, Sept. 15, 1957.....	99, 235
58	Advertisement, Alhambra Post-Advocate, Feb. 18, 1960.....	99
59	Advertisements of Kneelands of Sacramento, California, Sac- ramento Bee, Mar. 22, 1959.....	99
60	Advertisement, Kneelands of Sacramento, Nov. 5, 1959.....	99
61	Advertisement, Kneelands of Sacramento, Jan. 31, 1960....	99
62	Advertisement, Alhambra Post-Advocate, Mar. 24, 1960....	99
63	Advertisement, Los Angeles Times, page 9, Women's Sec- tion, May 15, 1960.....	99
64	1960 Summer collection of styles, DON SACHS Originals..	100, 229
65	1960 Summer collection of styles, PAUL SACHS Originals..	100, 229
66	(a-f, incl.) Six (6) 1960 mailing cards of appellant.....	213
67	1961 mailing piece of appellant.....	230
68	Copies of appellant's reorder cards, 1960.....	225
69	Newcas News, Nov. 19, 1961.....	...

No.		Record Page (RTR)
70	Page TM 93, Official Gazette, U. S. Patent Office, Sept. 20, 1960 .....	251
71	Advertisement, Vogue Magazine, Sept. 15, 1961.....	233
72	Advertising mat for DON SACHS Originals, 1961.....	98
73	Advertising mat for PAUL SACHS Originals, 1960.....	98
74a, b	Advertising mat and proof, 1961.....	98
75a, b	Advertising mat and proof, 1961.....	235
77	1962 Midseason Descriptive List of DON SACHS Dresses..	229
76	1962 Midseason Descriptive List of PAUL SACHS Originals Dresses .....	229
78	Sample collection of invoices for 1952 for shipments of PAUL SACHS dresses to California accounts.....	260
79	Sample collection of invoices for 1953 for shipments of PAUL SACHS dresses to California accounts.....	260
80	Sample collection of invoices for 1954 for shipments of PAUL SACHS dresses to California accounts.....	260
81	Sample collection of invoices for 1955 for shipments of PAUL SACHS dresses to California accounts.....	260
82	Sample collection of invoices for 1956 for shipments of PAUL SACHS dresses to California accounts.....	260
83	Sample collection of invoices for 1957 for shipments of PAUL SACHS dresses to California accounts.....	260
84	Sample collection of invoices for 1958 for shipments of PAUL SACHS dresses to California accounts.....	260
85	Sample collection of invoices for 1959 for shipments of PAUL SACHS and/or DON SACHS dresses to California accounts .....	260
86	Sample collection of invoices for 1960 for shipments of PAUL SACHS and/or DON SACHS dresses to California accounts .....	260
87	Sample collection of invoices for 1961 for shipments of PAUL SACHS and/or DON SACHS dresses to California accounts .....	260
88	Sample collection of invoices for 1962 up to time of trial for shipments of PAUL SACHS and/or DON SACHS dresses to California accounts .....	260
89	Label used by Eddie Silk.....	72, 74
91	Application for registration of trademark DON SACHS....	247
92	Appellant's Swatch Book, Summer, 1959.....	251, 259
93	Pacific Coast Travelers Publication, pages 61, 64.....	423
94	Pacific Coast Travelers Publication, page 50.....	424

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## APPELLEES' EXHIBITS.

No.	Record Page (RTR)
A	Cloth label "Sachs of California"..... 415, 432
B	Hang tag "Sachs of California"..... 415
C	Order form "Sachs of California"..... 520
D	Invoice "Sachs of California"..... 520
E	"Sachs of California" postal card..... 520
F	Letterhead "Sachs of California"..... 520
G	Envelope "Sachs of California"..... 520
H	Business card "Sachs of California"..... 520
I	Mailing piece "Sachs of California"..... 520
J	Reprint of ad, "California Stylist", Feb., 1961..... ...
K	Reprint, advertisement, Los Angeles Herald and Express, Dec. 21, 1960 ..... ...
L	1961 California Fashion Bulletin by Matilda Bergman..... ...
L-1	1962 California Fashion Bulletin by Matilda Bergman..... 388
L-2	1962 California Fashion Bulletin by Matilda Bergman..... 388
M	Fashion bulletin ..... 427
N	Graham Buying Service bulletin..... ...
O	Promotional bulletin, Irwin Schwab, Inc..... 388
P	"California Fashion Creators" publication, Spring Market Week, Jan. 7-10, 1962..... 67
Q	"California Fashion Creators" publication, Spring Market Week, Jan., 1961, "Fall Showing"..... 67
R	Advertisement, "California Apparel News", June, 1961..... ...
S	Page 1183 Los Angeles Central telephone directory..... ...
T	Page 1954 Los Angeles classified telephone directory..... ...
U	Page 90 New York City (Manhattan) classified telephone directory ..... ...
V	Letterhead, "Sachs", Waco, Texas..... 409
W	Letterhead, "Sachs—Fashion by the Yard"..... 409
X	Clipping, "California Apparel Newark, Mar. 2, 1962..... ...
Y	Pacific Coast Travelers publication, "Midsummer Market Week", Mar. 11-14, 1962..... 103
Z	Pacific Coast Travelers Buyers Guide, Sep. 13-16, 1959..... 103
AA	Pacific Coast Travelers publication, Sep. 24-27, 1961, page 48 103
BB	West Coast Salesmen's Association publication, Sep. 18-21, 1960 ..... 103

No.		Record Page (RTR)
CC	West Coast Salesmen's Association publication, Nov. 5-8, 1961 .....	103
DD	Advertisement, Kansas City Times, Apr. 25, 1953.....	378
EE	Letterhead for Sachs in Berlin, Germany, 1938.....	501
FF	Advertisement, Progress Bulletin, Pomona, Feb. 22, 1962, page 5 .....	428
GG	Advertisement, Phoenix Gazette, Mar. 1, 1962.....	425
HH	California Stylist, Publication, May, 1961.....	321
II	Letter to The Style Shop at Salinas, Calif.....	202, 309
JJ	California Stylist, Publication, Feb., 1961.....	321
KK	California Apparel Directory, Blue Book, 1961.....	410
LL	California Apparel Directory, Blue Book, 1962.....	410

